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WILCOX & CO

No.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant.

vs.

A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for Trumble Refining Company, a dissolved corporation,

Appellee,

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

FILED
NOV 2 1938
PAUL P. O'BRIEN,

Parker & Baird Company, Law Printers, Los Angeles.

No.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant.

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A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for Trumble Refining Company, a dissolved corporation,

Appellee,

Transcript of Record

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Parker & Baird Company, Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellant:

BEN HARRISON, Esq.,
United States Attorney;

E. H. MITCHELL, Esq.,
Assistant United States Attorney;

EUGENE HARPOLE, Esq.,
Special Attorney for the Treasury Department,

610 South Main Street,
Los Angeles, California.

For Appellees:

THOMAS R. DEMPSEY, Esq.,

A. CALDER MACKAY, Esq.,

523 West Sixth Street,
Los Angeles, California.

UNITED STATES OF AMERICA, ss.

To A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for Trumble Refining Company, a dissolved corporation, and to Thomas R. Dempsey, A. Calder Mackay and Arthur McGregor, 1104 Pacific Mutual Building, Los Angeles, California, their attorneys, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 29th day of September, A. D. 1938, pursuant to a petition for Appeal and Order Allowing the same filed August 30, 1938 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for Trumble Refining Company, a dissolved corporation, vs. UNITED STATES OF AMERICA, No. 5767-H, wherein the United States of America is defendant-appellant and you are plaintiff-appellee to show cause, if any there be, why the Judgment in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable HARRY A. HOLLZER United States District Judge for the Southern District of California, this 30 day of August, A. D. 1938, and of the Independence of the United States, the one hundred and sixty-second

H. A. Hollzer

U. S. District Judge for the Southern District of California.

Copies of Petition for Appeal, Order Allowing Appeal, Assignment of Errors, Order Extending Time Within which to Serve and File Bill of Exceptions, and Order Extending Term and Time received, and service of copy of above Citation are hereby acknowledged this 30th day of August, 1938.

Thomas R. Dempsey

A. Calder Mackay

Arthur McGregor

Attorneys for Plaintiff-Appellee.

[Endorsed]: Filed Aug. 30, 1938. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for Trumble Refining Company, a dissolved corporation,	AT LAW No. 5767-H
Plaintiffs,	FIRST AMENDED PETITION
v.	FOR RECOVERY
UNITED STATES OF AMERICA,	OF INCOME TAXES.
Defendant.	

The Plaintiffs above named complain of the Defendant and for cause of action allege:

I

That all times herein mentioned the Defendant, United States of America, was, and still is, a sovereign body politic.

II

That the Trumble Refining Company was incorporated under the laws of the State of Arizona on or about July 13, 1910 and existed as a corporation until on or about March 24, 1930. That the said Trumble Refining Company was duly and regularly qualified to do business in the State of California and its principal place of business was located at Los Angeles, California. That on or about March 24, 1930 said Trumble Refining Company was duly

and regularly dissolved and Plaintiffs are now duly appointed, qualified and acting trustees in dissolution of said corporation and are empowered and entitled to institute and maintain causes of action for and on behalf of said Trumble Refining Company.

III

That the said Trumble Refining Company from the time of its incorporation to and including the year 1917 was the owner and in possession of certain license agreements which on March 1, 1913 had a value of at least $850,000.00 and a remaining useful life from March 1, 1913, of at least eleven years, eight months, twenty days, and was therefore entitled, in the determination of its net taxable income, to an annual deduction of at least $72,511.90, for exhaustion of said license agreements, all of which was finally determined by the United States Board of Tax Appeals as will hereinafter more particularly appear.

IV

That the income and profits tax return so filed by the Trumble Refining Company for the calendar year 1917 showed a gross income of $97,503.11 from which was deducted general expense of $4,944.27 and depreciation of $1,407.45 making a net taxable income of $89,469.54. In determining the net taxable income as aforesaid, said Trumble Refining Company inadvertently failed and neglected to take as a deduction from income the exhaustion sustained on its license agreements in the sum of $72,511.90, thereby overstating its net taxable income by that amount. In determining the tax liability for said year 1917, the Trumble Refining Company computed its tax under Section 209 of the Revenue Act of 1917.

V

That on or about February 21, 1920 the Commissioner of Internal Revenue advised the Trumble Refining Company that its business was of such character as normally to require a substantial capital investment and that the income was attributable to the employment of such capital. That inasmuch as a large part of the invested capital could not be included under the statutory requirements for tax purposes consideration was given under the relief provisions of Section 210 of the Revenue Act of 1917 in lieu of Section 209 shown on the return. As a result of this determination an additional tax was proposed by the Commissioner of Internal Revenue in the sum of $6,365.00.

VI

That thereafter and on or about June 17, 1920 said Trumble Refining Company filed an amended income tax return for the year 1917 wherein it claimed a deduction from income for the exhaustion of its license agreements based upon the March 1, 1913 value thereof and disclosed as its correct tax for the year 1917 the sum of $2,120.88; at the same time and as a part of said amended return said Trumble Refining Company filed its claim for refund, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof, demanding the return to it, on account of the overpayment of taxes by it for the year 1917, of the sum of $9,749.80. At the time and as a part of the amended return and the claim for refund it filed a claim for abatement in the sum of $6,365.00, requesting the abatement of the additional income and excess profits taxes proposed by the Commissioner of Internal Revenue for the year 1917 as heretofore mentioned.

VII

Thereafter and between the dates of July 21 to August 17, 1921, a field investigation was made by an internal revenue agent acting on behalf of the Commissioner of Internal Revenue, of the returns filed by the Trumble Refining Company for the years 1917 to 1920, inclusive, including the amended return, claim for refund and claim for abatement for the year 1917, filed as aforesaid, and a copy of this report was forwarded to the Trumble Refining Company on or about September 14, 1921. As a result of the recommendation of the investigating officer the Commissioner of Internal Revenue, by his letter dated December 13, 1921, advised the Trumble Refining Company that the license agreements heretofore mentioned had no value for income tax purposes and that the claim for refund of $9,749.80 and the claim for abatement of $6,365.00 additional income and excess profits taxes for the year 1917 would be rejected.

VIII

Thereafter and on or about January 13, 1922, a demand for the additional income taxes of $6,365.00 covered by the aforementioned claim for abatement, together with the accrued interest of $1,082.05, aggregating $7,447.05 was made by the Collector of Internal Revenue for the Sixth Collection District of the State of California. Subsequently thereto and on or about January 21, 1922 a second claim for abatement was filed with the Collector of Internal Revenue for the Sixth Collection District of the State of California in the sum of $7,447.05, a copy of which is attached hereto, marked "Exhibit B" and made a part hereof.

IX

Thereafter and on or about February 1, 1922 the Trumble Refining Company filed with the Commissioner of Internal Revenue a formal protest against the proposed additional taxes as set forth in the aforementioned revenue

[Amended by order of 2/7/36 M. R. Winchell. Dep. Clerk] Sept. 14, 1921

agent's report dated ~~August 17, 1921~~ for the years 1917 to 1920, inclusive, demanding the establishment of a March 1, 1913 value of its license agreements and that a deduction from income be allowed by reason of the annual exhaustion thereof.

X

Thereafter and more particularly on January 19, 1923 the Commissioner of Internal Revenue, while considering the formal protest of Trumble Refining Company above referred to, suggested that it file an unlimited waiver of the statute of limitations within which time the Commissioner could make additional assessments for the year 1917 against it. In pursuance of such request the Trumble Refining Company on or about February 1, 1923 filed with the Commissioner of Internal Revenue an income and profits tax waiver, form 672-M, consenting to a determination and the assessment and collection of the amount of income and/or war profits taxes due under any return made by, or on behalf of Trumble Refining Company for the year 1917 irrespective of any period of limitation. Thereafter and more particularly on February 5, 1923 the Commissioner of Internal Revenue advised the Trumble Refining Company that its tax had been redetermined under the provisions of Section 210 of the Revenue Act of October 3, 1917 which resulted in an overassessment of

$151.17. That subsequently thereto the Commissioner of Internal Revenue issued a certificate of overassessment of the sum above referred to, a copy of which is attached hereto and made a part hereof, marked "Exhibit C". In the computation of tax shown on said certificate of overassessment the Commissioner failed, neglected and refused to allow the Trumble Refining Company any deduction from its gross income for exhaustion of its license agreements hereinabove referred to.

XI

That on or about December 9, 1922 one E. P. Adams, agent of Trumble Refining Company, had an informal conference with the Commissioner of Internal Revenue and requested a redetermination of its tax liability for the year 1917 and for the other years involved in the revenue agent's report. Thereafter a formal request was made by Trumble Refining Company in its letter of February 23, 1923 to the Commissioner of Internal Revenue for the privilege of filing additional data and a hearing to be set in Washington, D. C. Subsequently thereto, and on or about May 15, 1923 Trumble Refining Company sent a telegram to the Commissioner of Internal Revenue, a copy of which is attached hereto, marked "Exhibit D" and made a part hereof, requesting that instructions be given the Collector of Internal Revenue to withhold collection pending hearing in Washington, D. C. on the aforementioned claims for refund, protests, etc. On May 22, 1923 the Commissioner of Internal Revenue advised the Trumble Refining Company by telegram, a copy of which is attached hereto and marked "Exhibit E", that he had no authority to instruct the Collector to accept the abatement claim to replace the claim rejected, but that confer-

ence might be arranged on 1917 case if formal protest was filed. Thereafter on May 22, 1923 said Trumble Refining Company paid under protest to the Collector of Internal Revenue the sum of $7,860.19 covering the additional taxes of $6,365.00 as aforesaid and accrued interest thereon of $1,646.36. That acting in conformity with the telegraphic instructions of the Commissioner of Internal Revenue the Trumble Refining Company on or about April 29, 1924 filed a formal protest against the action of the Commissioner of Internal Revenue on the assessment of additional taxes as aforesaid for the year 1917 and subsequent years. This protest was considered by the Committee on Appeals and Review of the Commissioner's office on or about May 7, 1924. On July 14, 1924 the Committee on Appeals and Review recommended to the Commissioner of Internal Revenue that the March 1, 1913 value of the license agreements held by the Trumble Refining Company be fixed at $160,000.00 and that amortization of this sum be allowed, based on the remaining time the agreements had to run.

XII

That the determination of the 3/1/13 value of the license agreements owned by Trumble Refining Company, and the amount of exhaustion allowable as a deduction from income, was an issue involved in all years from 1917 to 1920, covered in the last above mentioned protest. That on or about November 19, 1928 the United States Board of Tax Appeals in the case of entitled Trumble Refining Company of Arizona, Petitioner, vs. Commissioner of

Internal Revenue, Respondent, Docket No. 11763, held that the Trumble Refining Company was the owner on March 1, 1913 of license agreements havings a value of $850,-000.00 on which it was entitled to take annual deductions for depreciation thereof based upon a life from that day of eleven years, eight months and twenty days and held that said Trumble Refining Company was entitled to an annual deduction for exhaustion of said license agreements in the sum of $72,511.90. In due course of time and on the 30th day of October, 1929 the Board of Tax Appeals entered its final order determining that the Trumble Refining Company was entitled to an annual deduction in the sum of $72,511.90 for exhaustion of its license agreements. That neither the Trumble Refining Company nor the Plaintiffs took an appeal from the Board's decision, and it became final on the 30th day of October, 1929.

XIII.

That on or about April 25, 1929 said Trumble Refining Company filed with the Commissioner of Internal Revenue an amended claim for refund, a copy of which is attached hereto, marked "Exhibit F" and made a part hereof, claiming the total amount of taxes paid by it as aforesaid for the year 1917. This claim for refund was accepted by the Commissioner as an amendment to the original claims theretofore made and filed by the Trumble Refining Company. That Taxpayer was advised by Commissioner's letter dated May 22, 1930, a copy of which is marked "Exhibit G", attached hereto and made a part hereof, that since the Commissioner had not acquiesced in the

decision of the United States Board of Tax Appeals for the years 1918, 1920, 1921, 1922, 1923, Docket Numbers 11763, 17492, 26434, and 32151 (14 BTA 38), Taxpayer's contention for depreciation of license agreements could not be allowed for the year 1917. That on July 25, 1930 a letter was written to the Taxpayer, a copy of which is marked "Exhibit H", attached hereto and made a part hereof, informing it that its claim for refund for the year 1917 was rejected. That by reason of the action taken by the Commissioner of Internal Revenue and his agents, Taxpayer's claims for refund and abatement were reopened, reconsidered, and kept before him at least until July 25, 1930, the date when the Taxpayer was advised that the amended claim for refund for the sum of $17,764.08 was rejected as aforesaid.

XIV

That neither said John P. Carter, nor said Rex B. Goodcell are at the commencement of this suit in the employ of the Federal Government in the capacity of Collector of Internal Revenue for the Sixth Collection District, said John P. Carter having resigned on the 5th day of March, 1922 and Rex B. Goodcell having resigned on the 5th day of April, 1926.

XV

That no action upon the claim hereinbefore referred to, other than as herein set forth, has been taken before Congress or before any of the departments of the government of the United States, or in any court other than by this amended petition filed herein; that no assignment or trans-

fer of said claim, other than by operation of law as hereinabove stated, has ever been made and Plaintiffs are the sole owners thereof; that Plaintiffs are justly entitled to the amount herein claimed from the Defendant, and there is no just credit or offset against said claim which is known to the Plaintiffs.

XVI

That notwithstanding the foregoing and the fact that the Trumble Refining Company was the owner on March 1, 1913 of license agreements having a value of $850,000.00 and a remaining life of eleven years, eight months and twenty days, and notwithstanding that it was entitled to an annual deduction for the exhaustion of said license agreements in the sum of $72,511.90, the Defendant has failed, neglected and refused to pay said Trumble Refining Company, or to said Plaintiffs or any of them the amounts overpaid by said Trumble Refining Company for the year 1917 as aforesaid and that the full amount thereof, to wit, the sum of $18,235.68 is now due and owing to Plaintiffs from the Defendant, together with interest as provided by law from the dates the respective amounts were paid.

WHEREFORE, the Plaintiffs pray for judgment against the Defendant in the sum of $18,235.68, together with interest as provided by law and for such other and further relief as to the Court may seem meet and proper in the premises.

Thomas R. Dempsey
A. Calder Mackay
Attorneys for Plaintiffs

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

A. J. Gutzler, F. M. McDonnell and Frank L. A. Graham being first duly sworn, depose and say that they are three of the Trustees named as Plaintiffs in the attached Petition and are authorized to verify the same; that they have read said Petition and are familiar with its contents and that they verily believe that the facts therein alleged are true and correct.

A. J. Gutzler (Signed)
F. M. McDonnell (Signed)
Frank L A Graham (Signed)

Subscribed and sworn to before me this 20th day of December, 1934.

Leo R. Howley (Signed)
Notary Public in and for said County and State

[Seal]

(Exhibit "A")

Treasury Department,
U. S. Internal Revenue
Form 46—March 1919.

Date of Filing to be

CLAIM FOR REFUND

Taxes Paid in Excess

IMPORTANT

State of.....)
) ss.
County of.....)

This claim should be forwarded to the Collector of Int. Rev. from whom notice of assessment was received.

TRUMBLE REFINING COMPANY OF ARIZONA
HIGGINS BUILDING, LOS ANGELES, CAL.

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete.

1. Business engaged in by claimant Leasing use of Refining Process
2. Character of assessment or tax Income and Profit Taxes—1917
3. Amount of tax paid $11,870.68 Taxable year 1917
4. Portion of No. 3 claimed as a refund $ 9,749.80
5. Unpaid assessment against which credit is asked $..... Taxable year .....

Deponent verily believes that the amount stated in item 4 should be refunded, and claimant now asks and demands refund of said amount for the following reasons:

(State facts regarding alleged overpayment)

We hereby claim refund of tax paid for the reasons set forth in letter attached hereto.

Signed
TRUMBLE REFINING COMPANY
A. J. Gutzler, Sec'y

Sworn to and subscribed before me this
17 day of June, 1920

Louis W. Gratz
Notary Public
(Title)

(Attached to Exhibit "A")

Los Angeles, California
June 16. 1920.

IT:T:SM
EMA—48751098
Mr. G. V. Newton,
Acting Assistant to the Commissioner
of Internal Revenue,
Treasury Department, Washington, D. C.

Dear Sir:

We acknowledge receipt of your letter of February 21, 1920 with reference to our Income and Excess Profits Tax returns for the year ended Dcember 31, 1917.

We note your decision that our business should be classified as a concern normally requiring a substantial capital investment and that therefore assessments, under provision of Section 209 of the Act of October 3, 1917, had been disallowed.

Before filing this return we endeavored to secure from your department a decision such as the above to guide us in the preparation of the return but were unable to do so. However, regu*al*tions subsequent to the date of filing our 1917 return had already led us to the conclusion that we were in error in filing under Section 209 and the returns for 1918 and 1919 were filed in accordance with the regular provisions governing returns of concerns with invested capital.

We have prepared and submit herewith a revised return for 1917, the total tax on which amounts to $2,120.88. This amount differs from the amount of tax calculated by you principally because of the fact that we have deducted

from income previously reported depreciation on account of the expiring life of the royalty contracts in the amount of $54,121.42, being one-fifteenth of the fair market value of said contracts on March 1, 1913.

We respectfully request a refund of the amount of $9,749.80, representing the difference between the amount paid, viz., $11,870.68, and the tax shown in the amended return attached hereto, $2,120.88. We also claim abatement of additional tax of $6,365.00 assessed in accordance with your letter.

In order that you may have complete information with which to review the attached amended return, we submit the following facts with respect to the organization and history of this company.

The Trumble Refining Company was incorporated July 13, 1910 with an authorized capital stock of $5,000,000.00, divided into 4,000,000 shares of common stock of $1.00 each and 1,000,000 shares of preferred stock at $1.00 each.

The Company immediately acquired from M. J. Trumble and F. M. Townsend all their rights in certain patents covering a process for refining petroleum, issuing in payment therefor 1,951,960 shares of common stock and 518,400 shares of preferred stock. Subsequently there was sold 1,248,040 shares of common stock and 281,600 shares of preferred stock for a consideration of $135,355.25, making a total outstanding capital stock of 3,200,000 common and 800,000 preferred.

The proceeds from the sale of stock were expended in the development of patents or in obtaining patents in foreign countries. By the year 1913, numerous contracts had been entered into for the use of these patents, and for the

year 1913 the net income of the company amounted to $30,438.06, and for 1914, $39,860.49.

In 1915 the Company sold to the Shell Company for $1,000,000.00 all of its letters patents of the United States and patents pending in the United States, together with all foreign rights thereto, the company retaining all contracts which were then in existence, representing business which had been developed. These contracts were entered on the books at a value of $811,821.36, which was considered a fair value by the officers of the company, as this asset would not have been sold for less than that figure at the time. This value is substantiated by subsequent royalties received therefrom as follows:

Year 1916,	$94,475.33
Year 1917,	96,499.59
Year 1918,	80,456.50
Year 1919,	84,761.37

From the date of sale of the patent rights, the company was in process of liquidation, as these patents had an average life from March 1, 1913 of 15 years, and at the end of that time royalties from the contracts would cease.

The value of these contracts, $811,821.36, should therefore be amortized over this period at the rate of $54,121.44 annually, to insure the return of the capital to the stockholders.

If the facts disclosed in this claim will not afford full relief and refund of the amount claimed, we respectfully request a full investigation of this claim before final action is taken.

Yours very truly,

A. J. GUTZLER

(Exhibit "B")

TREASURY DEPARTMENT
U. S. INTERNAL REV
Form 47 — Revised May, 1920
Ed. 250,000

Date of Filing to be

CLAIM FOR ABATEMENT

Taxes Erroneously or Illegally Assessed

State of California)
) ss:
County of Los Angeles)

IMPORTANT

This claim should be forwarded to the Collector of Int. Rev. from whom notice of assessment was received.

TRUMBLE REFINING COMPANY

(Name of claimant)

HIGGINS BUILDING, LOS ANGELES, CALIFORNIA

(Address of claimant; give street and number as well as city or town, and State.)

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant Leasing use of refining process
2. Character of assessment or tax Additional income and excess profits taxes for 1917 and interest
3. Amount of assessment $ 7,447.05
4. Amount now asked to be abated $ 7,447.05

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

The additional tax of $6,365.00 arose from an office audit of the returns of this corporation. An examination of the books of this company in connection with the determination of our tax liability for the years 1917 to 1920, inclusive, was completed by Internal Revenue Agent C. F. Degele on September 26, 1921. A statement of facts has been prepared for consideration by the Field Audit Division in connection with the audit of the revenue agent's report, which statement shows that this company is entitled to a refund.

Under the above conditions it is respectfully requested that the additional tax and interest arising from the office audit (now superceded) be abated.

Signed:

TRUMBLE REFINING COMPANY
F. M. TOWNSEND, PRES.

Sworn to and subscribed before me this
21st day of January, 1922

Pearl Tralle

Notary Public in and for the County
of L. A., State of Cal

(Title)

(Exhibit "C")

TREASURY DEPARTMENT

Washington

Office of
Commissioner of Internal Revenue

Income Tax Unit
IT:SA:SM
HSD-846

CERTIFICATE OF
OVERASSESSMENT
Number: 308813
Allowed: $151.17
Rejected: $

Trumble Refining Co. of Arizona
Higgins Building,
Los Angeles, California.

Sirs:

An audit of your income tax return for 1917, Form 1031-1103 and examination of related claim (if any), indicates that the amount of tax assessed to you for this years was in excess of the amount due:

You are advised, that your tax has been redetermined under the provisions of Section 210 of the Revenue Act of October 3, 1917.

Adjustment of Net Income

Net income as disclosed by the books	$87,562.05
Add: 1916 income tax	1,654.06
	$89,216.11
Less: Depreciation allowed	488.28
Corrected net income	$88,727.83

(See Page 2 attached)

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the Collector of Internal Rvenue for your district.

2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any) on income returns of years other than that on which the overpayment was made; or

3. The balance (if any) of the overpayment is refunded to you by check of the Treasury Department, forwarded herewith.

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit, from the date

Respectfully,
E. W. CHATTERTON,
Deputy Commissioner.
By S. ALEXANDER
Head of Div.

Schedule Number: 4677
District: 6th Cal
Amount abated: $151.17-May-1920. P30.L4
Amount credited: $
Year: 1918
Account Number: May-p198.L13
Amount refunded: $
Interest: $

Instructions Executed

Apr 23, 1923

Signature
Rex B. Goodcell
Collector Int. Rev.

– Page 2 –

Trumble Refining Company of Arizona

Computation of Tax

Excess profits tax		$13,575.36
Net Income	$88,727.83	
Less: Excess profits tax	13,575.36	
Amount taxable at 2%	75,152.47	1,503.05
Amount taxable at 4%	75,152.47	3,006.10
Total tax assessable		$18,084.51
Tax previously assessed March 1918, Page 198, Line 13		11,870.68
May 1920, Page 30, Line 4		6,365.00
Total tax previously assessed		$18,235.68
Total tax assessable		18,084.51
Overassessment		$ 151.17

(Exhibit "D")

WESTERN UNION TELEGRAM

PAID – CHARGE Haskins & Sells,
Los Angeles, Calif.

May 15, 1923.

Commissioner of Internal Revenue,
Washington, D. C.

Referring our letter February twenty-third file IT COLON SA COLON SM DASH HDD DASH EIGHT FOUR SIX STOP Local collector demands payment nineteen seventeen additional taxes six thousand two hundred thirteen eighty three and states it will be necessary to have wire authority from you to withhold collection pending hearing requested our letter. In view of understanding at informal conference December ninth and fact that questions involved in nineteen seventeen affect all years, please instruct collector withhold collection pending conference and advise us date set for such conference at which all years may be considered STOP We have filed bond with collector in amount one hundred fifty per cent of tax.

TRUMBLE REFINING COMPANY
OF ARIZONA

(Exhibit "E")

WESTERN UNION TELEGRAM

311

DB71 45 2 EXTRA COLLECT NL

WASHINGTON DC 21

TRUMBLE REFINING CO OF ARIZONA

AN ANSWER 15 CARE 1 B WU LOSANGELES CALIF

REPLY TELEGRAM FIFTEENTH NO AUTHORITY TO INSTRUCT COLLECTOR ACCEPT ABATEMENT CLAIM TO REPLACE CLAIM REJECTED CONFERENCE MAY BE ARRANGED ON NINETEEN SEVENTEEN CASE IF FORMAL PROTEST IS FILED BUT IS IMPRACTICABLE ON LATER YEARS UNTIL INFORMATION SUBMITTED IS CONSIDERED AND AUDIT COMPLETED

E W CHATTERTON DEPUTY COMMISSIONER.

(Exhibit "F")

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

Treasury Department
Internal Revenue Service
Form 843 – Jan., 1922
Comptroller General U. S.
January 18, 1922

Collector's Notation
District

.....

Account Number

.....

Date received
4/25/29

.....

Collector of Int. Revenue

IMPORTANT

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

CLAIM FOR

.....ABATEMENT OF TAX ASSESSED

.....CREDIT AGAINST OUTSTANDING ASSESSMENTS

X REFUND OF TAXES ILLEGALLY COLLECTED

.....REFUND OF AMOUNTS PAID FOR STAMPS
Used in Error or Excess

Date received by Administrative Unit

.....

State of California)
) ss.
County of Los Angeles)

NOTICE TO COLLECTOR

Collector must indicate in block above the kind of claim, except in Income Tax cases

TRUMBLE REFINING COMPANY OF ARIZONA

TYPE OR PRINT (Name of taxpayer or purchaser of stamps)
756 SUBWAY TERMINAL BUILDING
(Residence—give street and number as well as city and State)
LOS ANGELES, CALIFORNIA
(Business address)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

		Period	Year
1.	Business in which engaged Licensing Patents	January 1	1917
2.	Character of assessment or tax Income Tax	to December	31 - 17
3.	Amount of assessment or stamps purchased		$17,764.08
4.	Reduction of Tax Liability requested (Income and Profits Tax)		17,764.08
5.	Amount to be abated.....		
6.	Amount to be refunded (or such greater amount as is legally refundable)		17,764.08

7. Dates of payment (see Collector's receipts or indorsements of canceled checks) Mar 15, June 15, Sept 15 & Dec 15, 1918
8. District in which return (if any) was filed Los Angeles, California
9. District in which unpaid assessment appears.....
10. Amount of overpayment claimed as credit.....
11. Unpaid assessment against which credit is asked; period from.....to.....

Deponent verily believes that this application should be allowed for the following reasons:

Refund due in accordance with decision of U. S. Board of Tax Appeals, Docket Nos. 11763, 17492, 26434 and 32151, allowing amortization of patent rights and royalty contracts of $72,511.90 annually. This claim filed in accordance with provisions of Section 252 of Revenue Act of 1921 and Section 248 C of 1926 Act, and rulings covering by IT: 1717 CB December 1923, page 247; IT: 1870 and IT: 1871 CB. December 1923, pages 248 and 249, also IT: 2066 CB. December 1926, Page 318.

See statement attached for computation
(Attach additional sheets if necessary)

Signed:
TRUMBLE REFINING CO OF ARIZONA
By A. J. Gutzler, Secretary

Sworn to and subscribed before me this 24 day of April, 1929

C. M. Enns
Notary Public
(Title)

(Attached to Exhibit "F")

YEAR ENDED DECEMBER 31, 1917

Net Income as adjusted by Commissioner		$88,727.83
Depreciation of license agreements as fixed by Board's Decision		72,511.90
Net Taxable Income		16,215.93
Excess Profits Tax $16,215.93, less $3,000.00 exemption $13,215.93 @ 8% Section 209 of the 1917 Act.		1,057.27
		$15,158.66
Taxable @ 20%	$ 303.17	
" @ 40%	606.35	
Excess Profits Tax	1,057.27	
Adjusted Income Tax		1,966.79
Tax paid as per original return	11,870.68	
Additional tax assessed May, 1920	6,365.00	
Less over-assessment letter #308813, February 24, 1923	151.17*	
Tax Paid		18,084.51
Refund due Petitioner		16,117.72
Interest paid on additional Assessment of $1,213.83 paid May 22, 1923		1,646.36
TOTAL REFUND DUE TAXPAYER		$17,764.08

*In red.

(Exhibit "G")

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Int. Rev.

May 22, 1930

Address Reply to
Commissioner of Int. Rev.
and refer to
IT:AR:G-4
TCC

Trumble Refining Company of Arizona
756 Subway Terminal Building,
Los Angeles, California.

Sirs:

The following claims for refund of income and profits taxes have been examined and will be rejected for reasons stated below:

Year	Amount
1913	$ 304.38
1914	348.54
1915	725.11
1916	1,450.24
1917	17,764.08
1919	760.51
1920	1,463.35
1922	2,298.81
1923	2,298.81

All of the above claims are based upon the contention that you are entitled to an annual deduction from income of $72,711.90 for depreciation of license agreements in

view of the decision rendered in your case for the years 1918, 1920, 1921, 1922 and 1923 by the United States Board of Tax Appeals, Docket Numbers 11763, 17492, 26434 and 32151, 14 Board of Tax Appeals, 348, wherein you were allowed a March 1, 1913 value of $850,000.00 on certain license agreements for depreciation purposes resulting in an annual deduction of $72,511.90 based upon an average life of 11 years, 8 months and 20 days as at March 1, 1913.

Since the Commissioner has not acquiesced in the decision referred to above your contention cannot be allowed for those years which were not pending before the Board, namely, 1913, 1914, 1915, 1916, 1917 and 1919.

The claims for the years 1913, 1914, 1915, 1916, and 1919, which you contend were filed in accordance with the provisions of sections 252 and 284(c) of the Revenue Acts of 1921 and 1926, respectively, are barred by the statute of limitations. The deduction for depreciation of license agreements, if allowable for those years, represents a recovery through income of realized appreciation and as such does not result in any reduction of your invested capital for the years 1917 to 1921, inclusive. Furthermore, your invested capital has not been reduced due to the failure to take such deductions in the prior years. The provisions of section 252 relating to a decrease in the invested capital for failure to take adequate deductions in previous years, and section 284(c) which relates to the same matter are, therefore, not applicable. Since no tax was paid for any of the years 1913, 1914,

1915, 1916, and 1919 within four years of the filing of the claim, the statute of limitations has run and no refund can be made for those years.

For the years 1920, 1922 and 1923 the deduction for depreciation of license agreements in the amount of $72,711.90 has been allowed in the adjudication of your tax liability for each of those years in accordance with the decision of the Board. The contentions set forth in your claims for these years having been allowed, no further adjustments are necessary.

If you do not acquiesce in the proposed action relative to your claims for the years 1913, 1914, 1915, 1916, 1917 and 1919, and desire a hearing in the Unit at Washington, D. C., such hearing will be granted if written request is made therefor within thirty days from the date of this letter.

Page 2

If a hearing is not requested, the rejection of all of your claims will be officially scheduled at the expiration of the period indicated.

Respectfully,

DAVID BURNET,
Deputy Commissioner.

By H. B. Robinson
Head of Division

(Exhibit "H")

TREASURY DEPARTMENT
WASHINGTON

Office of
COMMISSIONER OF INTERNAL REVENUE

IT:C:CC—

July 25, 1930

Trumble Refining Company of Arizona,
756 Subway Terminal Building,
Los Angeles, California.

In re: Refund Claims for Years 1913 to 1917, incl. 1919, 1920, 1922, 1923.
Amounts: $304.38, $348.54, $725.11, $1,450.24, $17,764.08, $760.51, $1,463.35, $2,298.81, $2,298.81.

Sirs:

Your claims for refund of taxes, above referred to, were disallowed by the Commissioner on a schedule dated July 25, 1930.

Respectfully,

DAVID BURNET,
Deputy Commissioner.

By T. F. Langley,
Head of Division.

[Endorsed]: Filed Dec. 21, 1934. R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

At a stated term, to-wit: The February term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the court room thereof, in the City of Los Angeles, California, on Friday, the seventh day of February, in the year of our Lord one thousand nine hundred and thirty-six,

Present:

HONORABLE Harry A. Hollzer District Judge

A. J. GUTZLER, et al,	)	
Plaintiffs	)	
v.	)	No. 5767-H-Law
UNITED STATES OF AMERICA,	)	
Defendant.	)	

This cause coming on for hearing on Demurrer to First Amended Petition and for hearing on Motion to Strike from First Amended Petition for the Recovery of Income Taxes; A. Calder Mackay, Esq., appearing for the plaintiffs, files Amendment to the First Amended Petition, by consent, and it is stipulated Demurrer may be interposed to Amended Complaint as amended, following which the said A. Calder Mackay, Esq., makes a statement to the Court; Eugene Harpole, Esq., Special Attorney for the Bureau of Internal Revenue, and E. H. Mitchell, Assistant U. S. Attorney, appearing for the defendant, and the First Amended Petition is thereupon further amended by interlineation by the Clerk by order of the Court; whereupon, it is ordered that Demurrer and Motion to Strike stand submitted.

[Title of District Court and Cause.]

AMENDMENT TO FIRST AMENDED PETITION

Come now the plaintiffs in the above entitled case and respectfully request this Honorable Court to permit plaintiffs to amend their First Amended Petition by adding at the end of Paragraph III thereof the following:

That on or about March 15, 1918 the Trumble Refining Company filed its income and profits tax return for the year 1917 with John P. Carter, who was then the duly appointed, qualified and acting Collector of Internal Revenue for the United States of America for the Sixth Collection District located at Los Angeles, State of California, and said Trumble Refining Company paid to said John P. Carter the amount shown to be due in said return, to wit, the sum of $11,870.68, which was paid on or about June 12, 1918.

Thomas R. Dempsey
A. Calder Mackay
Attorneys for Plaintiffs

[Endorsed]: Filed Feb. 7, 1936 R. S. Zimmerman, Clerk, By M. R. Winchell Deputy Clerk

At a stated term, to-wit: the February term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday, the 11th day of February, in the year of our Lord one thousand nine hundred and thirty-six

Present:

The Honorable Harry A. Hollzer District Judge.

A. J. GUTZLER, et al,	)	
Plaintiffs,	)	
v.	)	No. 5767-H-Law
UNITED STATES OF AMERICA,	)	
Defendant.	)	

In conformity with the memorandum this day filed, it is ordered that the demurrer to the amended complaint as amended be over-ruled and the motion to strike out certain portions of said amended complaint be denied.

An exception is allowed to the defendant.

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America by and through its attorneys Peirson M. Hall, United States Attorney for the Southern District of California, E. H. Mitchell, Special Assistant, United States Attorney for the same District, and Eugene Harpole, Special Attorney for the Treasury Department and for answer to the First Amended Petition in the above-entitled action admits, denies, and alleges as follows:

I

The allegations of paragraph I of the First Amended Petition are admitted.

II

Answering the allegations of paragraph II of the First Amended Petition the defendant alleges that it has not sufficient knowledge or information upon which to form a belief as to the truth or falsity thereof and therefore denies the same.

III

The allegations of paragraph III of the First Amended Petition are denied.

IV

Answering the allegations of paragraph IV of the First Amended Petition defendant alleges that it has not sufficient knowledge or information upon which to form a belief as to the truth or falsity thereof and therefore denies the same.

V

The allegations of paragraph V of the First Amended Petition are admitted.

VI

Answering the allegations of paragraph VI, defendant admits that on or about June 17, 1920, *Trumbull* Refining Company filed an amended income tax return for the year 1917, and that at the same time said corporation filed a claim for refund; but all the other allegations of paragraph VI are denied.

VII

Answering the allegations of paragraph VII of the First Amended Petition defendant admits that the Commissioner of Internal Revenue, through his Internal Revenue Agents, made an investigation of the income tax liability of the plaintiff for the years 1917 to 1920, inclusive, and that a written report thereof was made on August 17, 1921. All other allegations of said paragraph VII are denied.

VIII

Answering the allegations of paragraph VIII of the First Amended Petition defendant admits that on July 13, 1922, a demand for additional income taxes was made of the *Trumbull* Refining Company by the Collector of Internal Revenue for the Sixth Collection District of the State of California. All other allegations of said paragraph VIII of the First Amended Petition are denied.

IX

The allegations of paragraph IX of the First Amended Petition are denied.

X

The allegations of paragraph X of the First Amended Petition are denied, except that it is admitted that on February 5, 1923, the Commissioner of Internal Revenue advised the Trumble Refining Company that its tax had been redetermined under the provisions of Section 210 of

the Revenue Act of October 3, 1917, which resulted in an overassessment of $151.17. That subsequently thereto the Commissioner of Internal Revenue issued a certificate of overassessment of the sum above referred to.

XI

The allegations of paragraph XI of the First Amended Petition are denied.

XII

Answering the allegations of paragraph XII of the First Amended Petition, the defendant denies the same, except that it is admitted that the United States Board of Tax Appeals promulgated an opinion in the case of *Trumbull* Refining Company of Arizona -v- Commissioner of Internal Revenue, which opinion is reported in Volume 14 of Board of Tax Appeals Reports at page 348. In this connection, defendant alleges that all of paragraph XII of said First Amended Petition is immaterial and irrelevant to the issues in this action.

XIV

Answering the allegations of paragraph XIV of the First Amended Petition, the defendant admits the same.

XV

Answering the allegations of paragraph XV of the First Amended Petition defendant alleges that it has not sufficient knowledge or information upon which to form a belief as to the truth or falsity thereof and therefore denies the same.

XVI

Answering the allegations of paragraph XVI of the First Amended Petition the defendant admits that neither the sum of $18,235.68, together with tax and interest for

the year 1917, or any part thereof, has been repaid to the plaintiff. All the other allegations of said paragraph XVI of the Petition are denied.

BY WAY OF FURTHER ANSWER AND AS AN AFFIRMATIVE DEFENSE DEFENDANT ALLEGES:

I

That at all times herein mentioned the defendant, United States of America was, and still is, a sovereign body politic.

II

That this Court is without jurisdiction over the subject matter of this action for the reason that the tax herein sought to be recovered was imposed under the "special assessment provision" of Section 210 of the Revenue Act of 1917.

WHEREFORE, defendant having fully answered the First Amended Petition prays that plaintiffs take nothing by this action and that defendant be allowed to go ahead with its costs.

Peirson M. Hall—E. H.
PEIRSON M. HALL,
United States Attorney.
E. H. Mitchell—E. H.
E. H. MITCHELL,
Special Assistant, U. S. Attorney.
Eugene Harpole
EUGENE HARPOLE,
Special Attorney,
United States Treasury Department.

[Endorsed]: Filed Apr. 16, 1936. R. S. Zimmerman, Clerk, By Robert P. Simpson, Deputy Clerk.

[Title of District Court and Cause.]

REQUEST BY PLAINTIFFS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Come now the plaintiffs above named and hereby request the Court, that in rendering and making its judgment in the above entitled cause, which has been submitted to the Court, said Court make specific Findings of Fact and Conclusions of Law upon the issue included in said cause, as set forth in the proposed Findings of Fact and Conclusions of Law hereto attached.

Dated: January 12, 1938.

Thomas R. Dempsey
Thomas R. Dempsey

A. Calder Mackay
A. Calder Mackay

Attorneys for Plaintiffs.

Approved as to form as provided by Rule 44, except as to Finding XXVIII

Ben Harrison—E. H.
United States Attorney

E. H. Mitchell—E. H.
Assistant United States Attorney

Eugene Harpole
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

FINDINGS OF FACT

I.

That the defendant, the United States of America, was, during all times material to this action, and still is, a sovereign body politic.

II.

That the Trumble Refining Company was incorporated under the laws of the State of Arizona on or about July 13, 1910, and existed as a corporation until on or about March 24, 1930. That the said Trumble Refining Company was duly and regularly qualified to do business in the State of California and its principal place of business was located at Los Angeles, California. That on or about March 24, 1930 said Trumble Refining Company was duly and regularly dissolved and plaintiffs are now duly appointed, qualified and acting trustees in dissolution of said corporation and are empowered and entitled to institute and maintain causes of action for and on behalf of said Trumble Refining Company.

III.

That the Trumble Refining Company within the time allowed by law and on March 29, 1918 and April 20, 1918, filed with the then Collector of Internal Revenue, John P. Carter, its original and amended income and excess profits tax returns, respectively, for the year 1917 wherein it disclosed a gross income of $97,503.11, deductions of $8,033.57 and a net taxable income of $89,469.54, which resulted in a tax liability, computed under Section 209 of the Revenue Act of 1917, of $11,870.68, which on June 14, 1918 was paid to the said Collector of Internal Revenue.

IV.

In determining its net taxable income as shown on said last mentioned return Trumble Refining Company inadvertently failed and neglected to take as a deduction from its gross income the exhaustion sustained upon its patent license agreements.

V.

That the said Trumble Refining Company from the time of its inception to and including the year 1917 was the owner and in possession of certain patent license agreements which on March 1, 1913 had a fair market value of $850,000 and a remaining useful life from March 1, 1913 of eleven years, eight months and twenty days, and was therefore entitled, in the determination of its net taxable income, to an annual deduction of $72,511.90, for the exhaustion of said patent license agreements. That the Trumble Refining Company's net taxable income for the year 1917 was the sum of $16,957.64.

VI.

That the invested capital of the Trumble Refining Company for the year 1917, as computed under the provisions of Section 207 of the Revenue Act of 1917, is the sum of $67,760.17.

VII.

That by letter dated February 21, 1920 the Commissioner of Internal Revenue proposed additional taxes against the Trumble Refining Company for the year 1917 in the sum of $6,365; in said letter of February 21, 1920 the Commissioner advised the Trumble Refining Company that in his opinion its business was of such a character as normally to require a substantial capital investment and the income was attributable to the employment

of capital, and that therefore the tax liability of Trumble Refining Company could not properly be determined under the provisions of Section 209 of the Revenue Act of 1917; in said letter the Commissioner furthermore advised the Trumble Refining Company that in his opinion a large part of the Trumble Refining Company's invested capital could not be included under the statutory requirements for tax purposes and that therefore he had computed the tax under the provisions of Section 210 of the Revenue Act of 1917.

VIII.

That the additional taxes of $6,365 so computed by the Commissioner were based upon a net income of $89,-469.54—the net income reported by the Trumble Refining Company in its original return which was erroneously computed without allowance for the exhaustion of its patent rights.

IX.

That the additional income and excess profits tax of the Trumble Refining Company for the year 1917 in the sum of $6,365.00, as computed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917 and proposed in said letter of February 21, 1920 were assessed by the Commissioner of Internal Revenue on May 17, 1920.

X.

That thereafter and on or about June 17, 1920 the Trumble Refining Company filed an amended income tax return for the year 1917 wherein it claimed a deduction for the exhaustion of its patent license agreements or royalty contracts in the sum of $54,121.42 based upon a March 1, 1913 value of $811,821.36 and wherein it disclosed an income tax liability of only $2,120,88.

XI.

That as a part of said last mentioned amended return the Trumble Refining Company on June 17, 1920 filed a claim for abatement of the said assessment made on May 17, 1920 of additional taxes in the sum of $6,365 for the year 1917.

That as a part of said last mentioned amended return and said claim for abatement the Trumble Refining Company on or about July 2, 1920 filed its claim for refund demanding the return to it on account of the overpayment of taxes by it for the year 1917 of the sum of $9,749.80.

XII.

That during August, 1921, the Commissioner of Internal Revenue through his Internal Revenue Agent at Los Angeles caused an investigation to be made in the matter of said amended return, said claim for refund and said claim for abatement, and as a result of such investigation additional income and excess profits taxes of $40,289.98 for the year 1917, and also large sums for the years 1918, 1919 and 1920 were proposed; that thereafter and under date of December 13, 1921 the Commissioner of Internal Revenue advised the Trumble Refining Company that its claim for refund filed on July 2, 1920, and its claim for the abatement of the taxes proposed by the Commissioner in his letter of February 21, 1920 were rejected.

XIII.

That on or about January 13, 1922 a demand for the payment of said additional income and excess profits taxes of $6,365 covered by the aforementioned claim for abatement and the Commissioner's letter dated February 21, 1920, together with accrued interest of $1,082.05 aggregating $7,447.05, was made upon the Trumble Refining

Company by the Collector of Internal Revenue for the Sixth Collection District of California. That on or about January 21, 1922 a second claim for abatement of said additional taxes for the year 1917 in the sum of $6,365 was filed with the Collector of Internal Revenue for the Sixth Collection District of the State of California.

XIV.

That on or about February 1, 1922 the Trumble Refining Company filed with the Commissioner of Internal Revenue a comprehensive brief and formal protest against the additional income and excess profits taxes proposed and set forth in the Revenue Agent's report, made by Revenue Agent Degele, dated August 17, 1921 for the years 1917 to 1920, inclusive, which brief and protest were prepared by said company's tax consultant, dealing with the subject matter of assessment of Federal taxes against it for the years 1917 to 1920, inclusive; that in and by said brief said company protested against the proposed additional taxes for each of the last mentioned years; that the principal contention discussed in said brief, and the one which said company asserted was applicable to, and affected alike each of the years 1917 to 1920, inclusive, was its contention that it was entitled to an annual deduction of $54,121.42 from income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements; that said brief contained, among other things, a computation of Federal income taxes for the year 1917, and also showed and claimed that the total tax due the United States Government from the Trumble Refining Company for the year 1917 amounted to the sum of $2,091.59 and that it had paid a Federal tax for that year amounting to $11,870.68, and that there was a refund due to said company for said year of $9,679.09.

XV.

That on December 9, 1922 the Trumble Refining Company's income tax consultant, Mr. E. P. Adams, conferred with one of the officials of the Bureau of Internal Revenue, said official being then in charge of the Special Audit Section; that at said conference said company's tax consultant requested a hearing on the subject of said company's taxes for the years 1917 to 1920, inclusive; that said official responded that said Bureau of Internal Revenue was not yet ready to take up the matter of the company's taxes for all of those years but would hold in abeyance the consideration and final determination of the tax liability for 1917 until said company's taxes for the remaining years could also be reviewed and finally determined. That at the request of said official, confirmed in writing by the Commissioner of Internal Revenue in a letter dated January 19, 1923, the Trumble Refining Company on or about February 1, 1923 executed and filed with the Commissioner of Internal Revenue an income and excess profits tax waiver, being an unlimited waiver of the statute of limitations governing the time within which the Commissioner could make additional assessments of taxes against said company for the year 1917.

XVI.

That on February 5, 1923 the Commissioner of Internal Revenue notified the Trumble Refining Company that its taxes for the year 1917 had been redetermined under the provisions of Section 210 of the Revenue Act of October 3, 1917 with the result that there appeared to be an overassessment of $151.17 which was abated; that said proposed overassessment was based upon a net income of $88,727.83, which was erroneously computed without

allowances for the exhaustion sustained on patent rights; that thereafter and under date of February 23, 1923 and in response to said notice said Trumble Refining Company wrote to the Commissioner of Internal Revenue calling attention to its said brief aforementioned and also calling attention to the aforementioned conference had by its tax consultant with an official of the Bureau on December 9, 1922, at which conference request had been made for a joint consideration of all the years involved at a hearing to be held in Washington, and in said response said company also requested that under these conditions further action be withheld in the matter of entering an over-assessment for 1917 and also requested the privilege of filing additional data to prove Trumble Refining Company's right to a substantial deduction for the exhaustion of its patent rights.

XVII.

That on or about May 15, 1923 the Trumble Refining Company telegraphed the Commissioner of Internal Revenue that in view of the understanding reached at said conference held December 9, 1922 and because the questions involved for the year 1917 affected all years, he should instruct the local Collector of Internal Revenue to withhold collection of additional taxes assessed for 1917 and that the Commissioner should fix a date for a conference at which all years might be considered; that thereafter and in response to said company's telegram, the Commissioner, on or about May 21, 1923, telegraphed said company that he had no authority to instruct the Collector to accept abatement claim to replace the claim re-

jected, but that a conference might be arranged on the 1917 case if a formal protest were filed and that it was impracticable on later years until information submitted was considered and audit completed.

XVIII.

That acting in conformity with the telegraphic instructions, the income tax consultant of Trumble Refining Company in the early part of May, 1924 held a conference with an official of the Commissioner of Internal Revenue's office and at said conference said company's representative delivered to said official a brief and protest containing additional data to support its right to an annual deduction from its gross income for the exhaustion of its patent license agreements based upon the March 1, 1913 value thereof.

XIX.

That in said brief the Trumble Refining Company protested against the decisions of the Commissioner on which assessment of additional taxes had been made for the year 1917, and were proposed for 1918 and subsequent years; that in said brief additional arguments were presented in support of said company's contention that it was entitled to the previously claimed annual deduction from income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements; that at said last mentioned conference said company's representative discussed with said official said company's contentions respecting taxes as to all of said years and that during said conference said official had before him a file containing documents pertaining to said company's taxes for all of said years; that among such documents then in the hands of said official were said income tax

returns, claims for refund and briefs, which briefs were filed on behalf of said company in February, 1922 and May, 1924, respectively, and also the Revenue Agent's report upon which additional assessments had been proposed to be made against said company for the years 1917 to 1920, inclusive.

XX.

That on May 22, 1923 the Trumble Refining Company paid under protest to the then Collector of Internal Revenue Rex B. Goodcell the sum of $7,860.19 covering said additional taxes for 1917 of $6,213.83 ($6,365 minus $151.17) and accrued interest thereon of $1,646.36.

XXI.

That on July 14, 1924 the Committee on Appeals and Review of the Commissioner's office considered the subject matter of the assessment of additional taxes against said company and thereafter recommended to the Commissioner that the March 1, 1913 value of said patent license agreements of Trumble Refining Company be fixed at the sum of $160,000 and that amortization be allowed to said Company on account of exhaustion of said patent license agreements on the basis of such valuation and that thereupon said recommendation was adopted by the Commissioner.

XXII.

That the Committee on Appeals and Review also determined that the taxes of the Trumble Refining Company for the year 1918 should be computed under the provisions of Section 328 of the Revenue Act of 1918 and approved a rate of 41.37 per cent. That the actions of the Committee on Appeals and Review in this respect were approved by the Commissioner of Internal Revenue.

XXIII.

That thereafter appeals were taken by the said Trumble Refining Company to the United States Board of Tax Appeals with respect to said company's taxes for the years 1918 and 1920 to 1923, inclusive, and thereafter and on or about November 19, 1928 the Board of Tax Appeals in the cases of Trumble Refining Company of Arizona, Docket No. 11763 involving the year 1918, Docket No. 17492 involving the years 1920 and 1921, Docket No. 26434 involving the year 1922 and Docket No: 32151 involving the year 1923, rendered its decision (reported in 14 B. T. A. page 348) holding that the Trumble Refining Company on March 1, 1913 was the owner and in possession of patent license agreements which on March 1, 1913 had a fair market value of $850,000 and a remaining useful life from March 1, 1913 of eleven years, eight months and twenty days, and was therefore entitled in the determination of its net taxable income to an annual deduction of $72,511.90 for the exhaustion and depreciation of the value of said patent license agreements; that on the 30th day of October, 1929, the United States Board of Tax Appeals entered its final order determining that the Trumble Refining Company was entitled to an annual deduction in the sum of $72,511.90 for the exhaustion of its license agreements. That neither the Trumble Refining Company nor the plaintiffs took an appeal from the Board's decision and said decision became final.

XXIV.

That on or about April 25, 1929 the Trumble Refining Company filed with the Commissioner of Internal Revenue its revised claim for refund in the sum of $17,764.08 on account of taxes, plus interest thereon, paid

for the year 1917 as aforesaid, said claim being computed in conformity with the aforementioned decision of the Board of Tax Appeals. That the Commissioner of Internal Revenue in his letter dated May 22, 1930, sent to the Trumble Refining Company, referred to claims for refund of the Trumble Refining Company for the years 1913, 1914, 1915, 1916, 1917, 1919, 1920, 1922 and 1923. In said letter the Commissioner stated that all of the claims for said years were based upon the contention that the Trumble Refining Company was entitled to an annual deduction from income of $72,511.90 for depreciation of license agreements in view of the decision rendered by the United States Board of Tax Appeals for the years 1918, 1920, 1921, 1922 and 1923, Docket Numbers 11763, 17492, 26434 and 32151, wherein the Trumble Refining Company was allowed a March 1, 1913 value of $850,000 on certain license agreements for depreciation purposes resulting in an annual deduction of $72,511.90 based upon an average life of eleven years, eight months and twenty days as at March 1, 1913. In said letter the Commissioner of Internal Revenue advised the Trumble Refining Company that its claims for refund for 1920, 1922 and 1923 had been allowed in accordance with the decision of the United States Board of Tax Appeals; also that said company's claims for refund for the years 1913, 1914, 1915, 1916 and 1919 were barred by the statute of limitations and that since no tax was paid for any of the last mentioned years within four years of the filing of the claim, the statute of limitations had run and no refund could be made. The letter also advised the taxpayer that since the Commissioner had not acquiesced in said decision of said Board of Tax Appeals with respect to the March 1, 1913 valuation of said license agreements for depreciation purposes, said company's conten-

tion could not be allowed for those years which were not pending before said Board, namely, 1913 to 1917, inclusive, and 1919. That the Commissioner's action in refusing to allow Trumble Refining Company a deduction of $72,511.90 from its gross income for 1917 in accordance with the decision of the Board of Tax Appeals and in refusing to allow the refund due as a result of such allowance was arbitrary.

XXV.

That the Commissioner of Internal Revenue in his letter to the Trumble Refining Company under date of November 3, 1930 for the first time stated or took the position in his negotiations with said Trumble Refining Company to the effect that a reopening of its claim for refund on account of 1917 taxes was prohibited and that the period for bringing suit thereon had expired, and at no time did the Commissioner advise the Trumble Refining Company that its refund for 1917 could not be allowed because its taxes were properly computed under the provisions of Section 210 of the Revenue Act of 1917.

XXVI.

That on July 25, 1930 the Commissioner of Internal Revenue notified the Trumble Refining Company in writing that its revised claim for refund filed on April 25, 1929 for the refund of 1917 taxes had been rejected.

XXVII.

That at all times from and after June 17, 1920 the Trumble Refining Company in its negotiations and dealings with the Commissioner took the position that it was entitled annually to a deduction from its gross income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements, such annual deduc-

tion being claimed to be in excess of the sum of $54,000; that the Commissioner's rejection on December 13, 1921 of said company's original claim for refund was vacated and set aside, and that said claim was reopened and reconsidered and was not rejected until July 25, 1930; that the Commissioner of Internal Revenue from the time the Trumble Refining Company filed its amended income tax return in June, 1920, disclosing that it had overpaid its taxes and was entitled to a refund for the taxes so overpaid, up to and until the date of the rejection of its revised claim considered the data and arguments submitted by the Trumble Refining Company and held in abeyance a final determination of the net taxable income of the Trumble Refining Company for the year 1917.

XXVIII.

That the Trumble Refining Company at no time requested or acquiesced in a determination of its excess profits taxes for the year 1917 in accordance with the provisions of Section 210 of the Revenue Act of October 3, 1917, and at all times material to this action protested the determination of its taxes under said section, and at all times protested the Commissioner's determination that its net taxable income was $89,469.54 or $88,727.83 or any sum in excess of $16,957.64; that the Commissioner was adequately apprised, prior to the making of his special assessment, of the various grounds upon which error was claimed in his computation of net income and tax; that the Commissioner never took the position that his special assessment made under the provisions of Section 210 of the Revenue Act of 1917 concluded the matter, but on the contrary kept the case open and kept on re-examining the factors essential to determine the net taxable income of Trumble Refining Com-

pany for the year 1917; that the Commissioner's determinations to assess Trumble Refining Company under the provisions of Section 210 of the Revenue Act of October 3, 1917 made by him in his letters of February 21, 1920 and February 5, 1923 were vacated and set aside and at no time has the Commissioner of Internal Revenue made a final determination that the Trumble Refining Company's income tax liability should be computed under the provisions of Section 210 of the Revenue Act of October 3, 1917.

XXIX.

That neither said John P. Carter, nor said Rex B. Goodcell were at the commencement of this suit in the employ of the Federal Government in the capacity of Collector of Internal Revenue for the Sixth Collection District, said John P. Carter having resigned on the 5th day of March, 1922 and Rex B. Goodcell having resigned on the 5th day of April, 1926.

XXX.

That no action upon the claims hereinbefore referred to, other than as herein set forth, has been taken before Congress or before any of the departments of the Government of the United States, or in any court other than by the original and the amended petitions filed herein; that plaintiffs are now the sole owners thereof.

XXXI.

That the correct tax liability of the Trumble Refining Company for the year 1917 is the sum of $3,389.19 and that the Trumble Refining Company overpaid its taxes for the year 1917 by the total sum of $16,341.68; that there is now due and owing to these plaintiffs for taxes thus overpaid for the year 1917 the total sum of $16,-

341.68, together with interest at the rate of 6% from the dates paid, $6,213.83 having been paid on May 22, 1923, together with interest of $1,646.36 or a total of $7,860.19, and the balance thereof, to wit, $8,481.49 having been paid on June 14, 1918.

CONCLUSIONS OF LAW.

The premises considered, the Court concludes as a matter of law as follows:

I.

That subsequent to the original rejection of said company's first claim for refund and first claim for abatement, that is to say, that subsequent to December 13, 1921 and prior to February 1923, and likewise subsequent to February 1923, the Commissioner reopened and kept reopened and continued to give further consideration to said company's claims and contentions respecting taxes paid and also respecting additional taxes proposed to be assessed for the year 1917 that said company's claims and contentions respecting such taxes were still pending before and under consideration by the Commissioner on the date, to wit, April 25, 1929, when said company filed its revised claim for refund, and that said company's claims and contentions respecting such taxes were finally passed upon and determined by the Commissioner when he rejected said revised claim for refund.

II

That the Commissioner's letters of February 21, 1920 and February 5, 1923, advising the Trumble Refining Company that its taxes had been computed under Section 210 of the Revenue Act of 1917 were not regarded by the Commissioner as final determinations of its tax liability, the essential factor, to wit, the net income of the Trumble Refining Company not then having been finally determined,

but on the contrary the Commissioner kept the case open and kept re-examining the situation; that the Commissioner's act on or about July 14, 1924 of determining that the Trumble Refining Company's patent license agreements had a March 1, 1913 value of $160,000, vacated and set aside whatever determination he had made that the Trumble Refining Company's tax liability should be determined under the provisions of Section 210 of the Revenue Act of October 3, 1917.

III

That the claim herein sued upon was filed within the time allowed by law.

IV

That this Court has jurisdiction to hear and determine this proceeding.

V

That the plaintiffs are entitled to have refunded to them and to recover from the defendant:

(a) The sum of $8,481.49, together with interest thereon at the rate of six per cent (6%) per annum from June 14, 1918; and

(b) The sum of $7,860.19, together with interest thereon at the rate of six per cent (6%) per annum from May 22, 1923.

Let judgment be entered accordingly and let proper exceptions by the defendant to the aforesaid findings and conclusions be noted.

Dated this 31 day of May, 1938.

H. A. Hollzer
Judge.

[Endorsed]: Filed Jan. 18, 1938 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for Trumble Refing Company, a dissolved corporation, Plaintiffs,	AT LAW No. 5767-H
vs.	JUDGMENT
UNITED STATES OF AMERICA, Defendant.	

This cause having come on regularly for trial on the 2nd day of February, 1937, before the Court sitting without a jury, a jury having been expressly waived in writing by the parties; A. Calder Mackay, Esq., appearing as attorney for plaintiffs, and Peirson M. Hall, United States Attorney, and Eugene Harpole, Special Attorney for the Bureau of Internal Revenue, appearing as attorneys for the defendant; and evidence, both oral and documentary, having been introduced by the respective parties and received, and the cause having been submitted to the Court for decision, and the Court having made and filed its findings of fact and conclusions of law and ordered that judgment be entered in favor of the plaintiffs in accordance therewith, and the defendant having excepted to said findings of fact and conclusions of law:

NOW, THEREFORE, it is the judgment of the Court that plaintiffs do have and recover from defendant (a) the sum of Eight Thousand Four Hundred Eighty-one Dollars and Forty-nine Cents ($8,481.49) together with

interest thereon at the rate of six per cent (6%) per annum from June 14, 1918, said interest amounting to Ten Thousand One Hundred Fifty-two & 70/100 ($10,152.70), and (b) the sum of Seven Thousand Eight Hundred Sixty Dollars and Nineteen Cents ($7,860.19) together with interest thereon at the rate of six per cent (6%) per annum from May 22, 1923, said interest amounting to Seven Thousand and Eighty and 63/100) ($7080.63), amounting in the aggregate to the sum of Thirty Three Thousand Five Hundred Seventy-five & 01/100 ($33,575.01), which shall bear interest according to law.

Dated this 31 day of May, 1938.

H. A. Hollzer
District Judge.

Approved as to form as provided by Rule 44.

Ben Harrison—E. H.
Ben Harrison
E. H. Mitchell—E. H.
E. H. Mitchell
Eugene Harpole
Eugene Harpole
Attorneys for Defendant.

Judgment entered and recorded May 31, 1938

R. S. ZIMMERMAN,
Clerk.
By L. Wayne Thomas,
Deputy Clerk.

[Endorsed]: Filed May 31, 1938. R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered that heretofore, to-wit: on the 2nd and 3rd days of February, 1937, the above entitled cause came on regularly for trial at Los Angeles, California, upon the issues joined herein before the Honorable Harry A. Hollzer, sitting as Judge of the above entitled Court without a jury, a jury having been duly waived by the parties through their counsel.

Thereupon the plaintiffs introduced the following written Stipulation of Facts in evidence as the plaintiffs' Exhibit 1:

PLAINTIFFS' EXHIBIT 1

"(Title of Court and Cause)

"STIPULATION

"It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts are true.

I

"That the defendant, the United States of America, was, during all times material to this action, and still is, a sovereign body politic.

II

"That the Trumble Refining Company was incorporated under the laws of the State of Arizona on or about July 13, 1910 and existed as a corporation until or or about March 24, 1930. That the said Trumble Refining Company was duly and regularly qualified to do business in the State of California and its principal place of business was located at Los Angeles, California. That on or

about March 24, 1930 said Trumble Refining Company was duly and regularly dissolved and plaintiffs are now duly appointed, qualified and acting trustees in dissolution of said corporation and are empowered and entitled to institute and maintain causes of action for and on behalf of said Trumble Refining Company.

III

"That attached hereto, Marked Exhibits 'A' and 'B' and made a part hereof, are the original income and excess profits tax returns filed by the Trumble Refining Company for the year 1917, on or about March 29, 1918 and April 20, 1918, respectively. That the income and excess profits tax of $11,870.88 disclosed upon said returns for the year 1917, was paid on the 14th day of June, 1918.

IV

"That on February 21, 1920 the Commissioner of Internal Revenue mailed a letter to Trumble Refining Company, copy of which is attached hereto, marked Exhibit 'C' and made a part hereof. That the additional tax of $6,365.00 proposed for the year 1917 in said letter was assessed by the Commissioner of Internal Revenue on May 17, 1920.

V

"That soon thereafter a claim for the abatement of said additional taxes, a copy of which is attached hereto, marked Exhibit 'D' and made a part hereof, was filed by said Trumble Refining Company, which abatement claim was filed on June 17, 1920.

VI

"That on or about June 17, 1920 the Trumble Refining Company filed an amended income tax return for the

year 1917, a true copy thereof being attached hereto, marked Exhibit 'E' and made a part hereof, disclosing a tax of $2,120.88 to be due for the year 1917.

VII

"That on July 2, 1920 the Trumble Refining Company filed a claim for refund, a copy of which is attached hereto, marked Exhibit 'F' and made a part hereof, covering $9,749.80, of the taxes paid by it on June 14, 1918.

VIII

"That by letter dated December 13, 1921, copy of which is attached hereto, marked Exhibit 'G' and made a part hereof, the Commissioner of Internal Revenue advised the Trumble Refining Company that its claim for the refund of taxes for the year 1917 in the sum of $9,749.80 and its claim for the abatement of the additional assessment of $6,365.00 for the year 1917 were rejected.

IX

"That on or about January 13, 1922 a demand for the payment of the additional income and excess profits tax of $6,365.00 covered by the aforementioned claim for abatement and the Commissioner's letter dated February 21, 1920, together with accrued interest of $1,082.85, aggregating $7,447.05, was made by the Collector of Internal Revenue for the Sixth Collection District of the State of California.

X

"Subsequent thereto and on or about January 21, 1922 a second claim for abatement was filed with the Collector of Internal Revenue for the Sixth Collection District of the State of California in the sum of $7,447.05, a copy of which claim is attached hereto, marked Exhibit 'H' and made a part hereof.

XI

"That pursuant to the request made by the Commissioner of Internal Revenue in his letter to the Trumble Refining Company dated January 19, 1923, a copy of which is attached hereto, marked Exhibit 'I' and made a part hereof, the Trumble Refining Company executed an income and excess profits tax waiver and filed the same with the Commissioner of Internal Revenue, a copy of said waiver being attached hereto, marked Exhibit 'J' and made a part hereof.

XII

"That on or about February 5, 1923 the Commissioner of Internal Revenue in writing advised the Trumble Refining Company that its tax liability had been redetermined under the provisions of Section 210 of the Revenue Act of October 3, 1917, which resulted in an overassessment of $151.17, a copy of said letter being attached hereto, marked Exhibit 'K' and made a part hereof.

XIII

"That attached hereto, marked Exhibit 'L' and made a part hereof is a true copy of the Commissioner's schedule abating said assessment to the extent of $151.17.

XIV

"That under date of February 23, 1923 the Trumble Refining Company made a written request to the Commissioner of Internal Revenue for the privilege of filing additional data and also requesting a hearing to be set in Washington, D. C., a copy of said letter being attached hereto, marked Exhibit 'M' and made a part hereof.

XV

"That on or about May 15, 1923 the Trumble Refining Company sent a telegram to the Commissioner of Internal Revenue, a copy of which is attached hereto, marked Exhibit 'N' and made a part hereof, requesting that instructions be given the Collector of Internal Revenue to withhold collection pending hearing in Washington, D. C. Under date of May 22, 1923 the Commissioner of Internal Revenue advised the Trumble Refining Company by telegram, a copy of which is attached hereto, marked Exhibit 'O' and made a part hereof, that he had no authority to instruct the Collector to accept the abatement claim to replace the claim rejected and that a conference may be arranged on 1917 case if formal protest is filed.

XVI

"That thereafter and on May 22, 1923 Trumble Refining Company paid under protest to the Collector of Internal Revenue the sum of $7,860.19 covering additional taxes of $6,213.83 ($6,365.00 minus $151.17) and accrued interest thereof on $1,646.36.

XVII

"That on or about November 19, 1928 the United States Board of Tax Appeals in the cases of Trumble Refining Company of Arizona Docket No. 11763 involving the year 1918, Docket No. 17492 involving the years 1920 and 1921, Docket No. 26434 involving the year 1922 and Docket No. 32151 involving the year 1923, rendered a decision, which decision is reported in the

official reports of the Board of Tax Appeals designated as 14 B. T. A. at page 348. That no appeal from the decision of the Board of Tax Appeals was taken by either the Commissioner of Internal Revenue or the Trumble Refining Company.

XVIII

"That attached hereto, marked Exhibit 'P' and made a part hereof, is a true copy of a claim for refund filed by Trumble Refining Company with the Collector of Internal Revenue at Los Angeles on or about April 25, 1929 in which the Trumble Refining Company demanded the return to it of the total amount of taxes paid by it on the 14th day of June, 1918 and the 22nd day of May, 1923.

XIX

"Under date of May 22, 1930 the Commissioner of Internal Revenue advised the Trumble Refining Company by letter, a copy of said letter being attached hereto, marked Exhibit 'Q' and made a part hereof, that since the Commissioner had not acquiesced in the decision of the United States Board of Tax Appeals for the years 1918, 1920, 1921, 1922 and 1923, Docket Numbers 11763, 17492, 26434 and 32151, (14 B. T. A. 348), the Trumble Refining Company's contention for depreciation of its license agreements could not be allowed for the year 1917. That on July 25, 1930 the Commissioner wrote a letter to the Trumble Refining Company, a copy of which is attached hereto, marked Exhibit 'R' and made a part hereof, advising that its claim for refund for the year 1917 was rejected.

XX

"That neither said John P. Carter, nor said Rex B. Goodcell are at the commencement of this suit in the employ of the Federal Government in the capacity of Collector of Internal Revenue for the Sixth Collection District, said John P. Carter having resigned on the 5th day of March, 1922 and Rex B. Goodcell having resigned on the 5th day of April, 1926.

XXI

"That no action upon the claim hereinbefore referred to, other than as herein set forth, has been taken before Congress or before any of the Departments of the Government of the United States, or in any court other than by the amended petition filed herein; that plaintiffs are now the sole owners thereof.

"Dated: February 2, 1937.

THOMAS R. DEMPSEY
Thomas R. Dempsey
A. CALDER MACKAY
A Calder Mackay
Attorneys for Plaintiffs
PEIRSON M. HALL
Peirson M. Hall,
U. S. Attorney

.....,
Asst. U. S. Attorney
EUGENE HARPOLE,
Eugene Harpole,
Special Attorney, Bureau of Internal Revenue."

EXHIBIT A

"REC'D 4-5 48,751,098

Mar. 29, 1918

6th Dist.—California

CORPORATION INCOME TAX RETURN

(for all corporations except railroad and insurance companies)

Caution) (Do not write in this
Read this form and) (space
all instructions care-) (Received
fully and fill in supple-) (———————
mentary statement on) (List
back of return first.) (Month Page Line
Totals in supplemen-) (———————
tary statement must) (Mar. 198 13
agree with totals on) (
face of return) (Audited by 913

Return of annual net income for the

(Calendar year 1917
(fiscal year ended December 31, 1917

Name of corporation Trumble Refining Company of Arizona

Principal Office Higgins Building, Los Angeles, California.

Kind of business carried on Licensing the use of oil refining process.

Date of organization July 13, 1910

IT –SA ABATEMENT Claim No. 77826	RECEIVED	IT –SA REFUND Claim No. 78180	RECEIVED
Claimed: $6,365.00		Claimed: $9,749.80	
Approved:		Approved:	
Rejected: $6,365.00		Rejected: $9,749.80	
GB Oct. 14/21		G.B. Oct. 14/21	

1. Total amount of paid-up capital stock outstanding at the close of the year, or if there is no capital stock the capital other than interest-bearing indebtedness employed in the business at the close of the year. Unissued or treasury stock must not be included in this item, but only stock actually issued and outstanding at the close of the year for which this return is made.

(a) Paid-up 'common stock' . . .	$274,000.00
(b) Paid-up 'preferred stock' . .	545,800.00
Total paid-up stock	$819,800.00
or (c) Capital employed in business .	$————

2. Total amount of bonded or other interest-bearing indebtedness outstanding at the close of the year, exclusive of indebtedness wholly secured by collateral the subject of sale or hypothecation in the ordinary business of the company and exclusive also of in-

debtedness incurred in the purchase of securities, the income from which is not subject to income tax.

Character of obligation	Rate of interest	Principal
		None
Total indebtedness		

INCOME

3.	(a) Gross sales and other income from operations	$ None
	(b) Income from rentals, royalties, etc.	96,499.59
	(c) Income from interest (see item 3c on back of return)	1,003.52
	(d) Income from dividends (see item 3d on back of return)	None
	(e) Income from all other sources (see item 3e on back)	None
	Total gross sales and other income	$97,503.11

DEDUCTIONS

(See corresponding items on back of return)

4.	(a) Cost of goods and other property sold	$ None
	(b) Expenses, general	4,944.27
5.	(a) Losses sustained charged off	None

	(b) Depreciation charged off	1,407.45	
	(c) Depletion charged off	None	
6.	(a) Interest paid (except as entered under 6b and c)	None	
	(b) Interest paid on deposits (for banks only)	None	
	(c) Interest paid on indebtedness wholly secured by collateral .	None	
7.	(a) Domestic taxes paid, not including income and excess profits taxes	1,681.85	
	(b) Foreign taxes paid .	None	
	Total deductions . .	$8,033.57	
	Less total deductions		8,033.57
8.	Total net income		$89,469.54
8.	Total net income forwarded . .		$89,469.54
	Less (a) Excess profits tax (item) 12 .	$6,917.56	
	(b) Dividends received out of earnings of 1913, 1914, 1915 . . .	None	
	Total (a plus b) . . .		6,917.56

9.	(a) Amount taxable at 2% (item 8 less total of a plus b)		$82,551.98
	(b) Amount taxable at 1% (item 8b)		None
10.	Amount of total net income shown in item 8		$89,469.54
	Less: (a) Excess profits tax (item 12)	$6,917.56	
	(b) Dividends received (item 3d)	None	
	Total (a plus b)		6,917.56
11.	Amount taxable at 4% (item 10 less total of a plus b)		$82,551.98
	If return is made for a full fiscal year ended in 1917, compute tax on as many twelfths of item 11 as there are months from January 1, 1917, to the close of the fiscal year. Enter amount taxable here.		
12.	Amount of excess profits tax (see instructions below)		$ 6,917.56
13.	Amount of 2% tax (2% of item 9a) .		1,651.04
14.	Amount of 1% tax (1% of item 9b) .		None
15.	Amount of 4% tax (4% of item 11) .		3,302.08
16.	Total tax assessable		$11,870.68

We, the undersigned, president and treasurer of the above-named company, whose return of net income is herein set forth, being severally duly sworn, each for him-

self, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return, are, to his best knowledge and belief, true and correct in each and every particular.

Sworn to and subscribed before me) this 28th day of March, 1918.

LOUIS W. GRATZ
Notary Public,
In and for the County of Los Angeles, State of California.

F. M. TOWNSEND,
President.

A. J. GUTZLER,
Secretary.

(Seal of officer taking affidavit)

(SEAL)

AUDITED
Tax liability Increased $.....
Penalty $.....
Tax liability Reduced $.....
Claim rejected for $.....
Claim Control No. .....
Basis of Audit
Unit No. 2
(Balance illegible)

ASSESSMENT	
Add Income Tax	$6,365.00
Penalty	$.....
	$6,365.00
CREDITS	
Overpayments	$.....
	$.....
	$.....
Balance tax due	$6,365.00
Basis: Office Audit Feb. 19, 1920	
30 Line 4	

GENERAL INSTRUCTIONS

(General Instructions omitted as immaterial

SUPPLEMENTARY STATEMENT

The following information must be furnished, either on this sheet or on attached schedules, by every corporation, joint stock company, or association. Without such information the return will not be accepted as complete. The items below relate to the correspondingly numbered items on the first page.

3. (c) FROM INTEREST.

Interest to be reported as income for the purpose of the income tax includes all interest received on bonds or securities owned by the corporation except interest on obligations of a State or political subdivision thereof or interest upon the obligations of the United States or its possessions.

3. (d) FROM DIVIDENDS RECEIVED.

Any distribution made or ordered to be made by a corporation out of its earnings or profits accrued since March 1, 1913, whether in cash or stock of the paying company, must be returned (under Item 3(d) on front page of this form) by the receiving corporation as income of the year in which the distribution was made or ordered to be made and will be taxed at the rates prescribed by law for the years in which surplus or profits distributed were earned, viz. 1% on amounts received out of earnings of 1913 (subsequent to March 1, 1913), 1914 and 1915, and 2% on amounts received from earnings of 1916 and 1917. A statement from the corporation paying the dividends in-

cluded herein should be attached to this return, showing separately the amount of dividends paid out of earnings of each year; otherwise, they will be deemed to have been paid out of the earnings of 1917 and will be taxed 2%. The receiving corporation, in order that tax may be computed on dividends received in 1917 at the rates applicable to the years in which the profits were earned, must fill in the following form:

Dividends received in 1917 out of profits earned each year subsequent to March 1, 1913.

1913	1914	1915	1916	1917	Total
$.....	$.....	$.....	$.....	$.....	$ None

3. (e) FROM OTHER SOURCES.

Income received from all sources not elsewhere specified should be itemized below:

.....$.....
.....$.....
.....$.....
Total .....$ None

4. (a) COST OF GOODS AND OTHER PROPERTY SOLD.

Report the cost of goods sold in the following form:

Merchandise bought for sale.....$.....

Cost of manufacturing or otherwise producing goods (if separately shown on books). (Submit schedule showing principal items of cost).....$.....

Plus inventories at beginning of year.....$.....
Total .....$ None
Less inventories at end of year.....$.....

N Net cost of goods sold.....$.....
Explanations .....

If the corporation makes inventories of merchandise or materials, explain the basis on which they are made, whether (a) at cost, or (b) at cost or market value, whichever is lower. If no inventories are made, make no entries referring to inventories, but report the total cost of goods purchased or produced during the year. If the cost of manufacturing or otherwise producing goods is not kept separate from general expenses in the corporation's accounts, include such cost in "Expenses, general" below.

Corporations dealing in real estate, and any corporation that has sold any of its capital assets during the taxable year, should report the cost of the property sold in the following form:

1. Original cost of property.....$.....
2. Market value March 1, 1913, if acquired before that date.....$.....
3. Cost of subsequent improvements, if any..$.....
4. Depreciation and depletion to date of sale..$.....
5. Net cost (item 1 or item 2 plus item 3 minus item 4).....

State how market value March 1, 1913, was determined

.....

.....

Does such value include any good will? If so, how much? $.....

4. (b) EXPENSES, GENERAL.

This item should include only the ordinary and necessary expenses paid within the year in the operation of the business and maintenance of the properties of the corporation, itemized as per schedule below. It must not include any expenditures reported under 4(a), 5, 6 or 7.

Expenditures for incidental repairs which do not add to the value or appreciably prolong the life of property are deductible as expenses, but expenditures for new buildings, permanent improvements or betterments which increase the value of property, or for restoring or replacing property, are not deductible under this or any other item of the return. Such expenditures are properly chargeable to capital account, to be extinguished through annual depreciation charges.

Payments made to officers or employees, who are stockholders, in the guise of salaries or compensation, the amount of which is based upon the stockholdings of such officers or employees, are not deductible as a business expense.

1.	Salaries of officers	$ 2,400.00
2.	Labor, wages, commissions, etc. (not included in 'cost of manufacturing or otherwise producing goods' under 4(a)	
3.	Rents, royalties, and other payments in lieu of rent	810.00
4.	Repairs, ordinary and incidental	
5.	Other expenditures (classify)—Office and misc. expenses	1,734.27
	Total expenses	$ 4,944.27

If salaries were increased or extra compensation was paid to officers, state the amount, the reason therefor, and the basis on which computed.....

5. (a) LOSSES.

Losses deductible under this item must be distinguished from depreciation or allowances for exhaustion, wear and tear. The losses, not compensated by insurance or otherwise, must be absolute, complete, actually sustained during the year, and charged off on the books of the corporation.

Kind of property on which loss is claimed	Cost of property	Cause of loss	Amount charged off within year
.....			$.....
.....			.....
Total			$ None

When were the deducted losses ascertained to be such?

.....

How were they so ascertained?.....

The cost of property lost should be determined as indicated in item 4(a).

A bad debt offsetting income accrued since January 1, 1909, will not be allowed as a deduction unless the amount was reported as income for the year in which the debt was created.

State how the debts charged off (if any) were ascertained to be worthless.....

If at any future time a debt charged off as worthless is collected the amount collected must be returned as income for the year in which received.

Unpaid debts are not deductible if made good by recovery of property sold or retention of property pledged.

5. (b) DEPRECIATION.

The amount deductible on account of depreciation is an amount charged off which fairly measures the loss during the year in the value of physical property by reason of exhaustion, wear, and tear. Such amount should be determined upon the basis of the cost of the property and the probable number of years constituting its life. Stocks, bonds and like securities, as well as any other intangible assets, are not subject to exhaustion, wear and tear within the meaning of the law. Hence any amount charged off as representing a shrinkage in the value of such assets is not deductible either as depreciation or as a loss.

Depreciation computed on total invoice value of merchandise in stock is not an allowable deduction by reason of damage or obsolescence the merchandise is unsalable.

If a deduction is made on account of depreciation, the following statement must be filled in:

Kind of property	Its cost	Probable life after acquirement	Amount of depreciation charged off: This year	Amount of depreciation charged off: Previous years
Apparatus	$21,689.12	8 yrs.	$1,203.96	$10,123.81
Office furniture & equipment	1,632.59		203.49	624.70
Totals	$23,321.71		$1,407.45	$

If building, state under 'Kind of property' the material of which constructed.

5. (c) DEPLETION.

Depletion applies to the exhaustion of natural deposits, and contemplates a deduction to return to the corporation the capital invested, or in case of purchase prior to March 1, 1913, an amount sufficient to return to the corporation the fair market price or value of such deposits as of that date. An allowable deduction on account of depletion must not exceed the fair market value as of March 1, 1913, or the cost subsequent to that date, of the product mined and sold during the year, and will be determined in accordance with the rule set out in Articles 170 to 173, Regulations 33, Revised. The amount sought to be deducted on this account must be charged off on the books of the company.

	Its cost if acquired subsequent to	#Fair market value as of	Amount of depletion charged off	
*Kind of property	March 1, 1913	March 1, 1913	This year	Previous year
	$.....	$.....	$.....	$.....
.....	NONE			
.....	.....	.....	.....	.....

*Coal, iron ore, copper, oil or gas.

#State how fair market value as of March 1, 1913 was determined.....

6. INTEREST PAID.

(a) The amount of interest deductible under (a) is the amount actually paid within the year on an amount of bonded or other indebtedness (except on indebtedness falling under 6(b) or 6(c) and indebtedness incurred for the

purchase of obligations or securities the income from which is exempt from income tax) not in excess of the paid-up capital stock outstanding at the close of the year, or if there is no capital stock, the entire amount of capital (not including interest-bearing indebtedness) employed in the business at the close of the year, plus, in each case, one-half of the interest-bearing indebtedness also then outstanding.

Capital employed in the business, as here used, contemplates the entire capital paid in by the members of the company, including so much of the accumulated surplus as is actually employed in the business, but does not include any borrowed capital or interest-bearing indebtedness.

(b) Interest paid (by banks) on deposits or on money received for investment and secured by interest-bearing certificates of indebtedness issued by a bank, banking association, or loan or trust company is deductible in the entire amount so paid.

(c) If the corporation's indebtedness, or any part thereof, is wholly secured by collateral which is the subject of sale or hypothecation in the corporation's ordinary business as a dealer in such property, the interest paid on an amount of such indebtedness not exceeding the actual value of the collateral may be deducted.

Describe all obligations on which interest is paid in the following form. Distinguish plainly collateral loans falling under 6(c) and also obligations incurred for the purchase of securities, the income from which is exempt from income tax.

Kind of Obligation	Amount of Principal	Rate of Interest	Amount of interest paid
	$		$
Total	$		$

7. (a) TAXES PAID.

Taxes, paid or accrued on the books of the corporation during the taxable year, are deductible with the following exceptions: Federal income and excess profits taxes (including taxes paid on the interest on its own obligations in pursuance of a covenant contained therein relieving the holder of liability for such taxes), foreign taxes on income derived from sources within the United States by foreign corporations, local taxes specially assessed against property on account of benefits derived from public improvements or betterments, and taxes upon the corporation's capital stock in the hands of the stockholders.

BASIS OF RETURN.

Is this return made on the basis of actual receipts and disbursements? .....

If not, describe fully what other basis or method was used in computing net income.....

UNDISTRIBUTED INCOME, SURPLUS AND UNDIVIDED PROFITS.

Total net income of taxable year preceding that for which this return is made (less income tax paid thereon)	$82,702.83
Amount of such income remaining undistributed six months after the close of that year	None

Amount of such income remaining undistributed twelve months after the close of that year	None
Total surplus and undivided profits at close of taxable year	$23,243.75

If sufficient space is not provided for the entry of any information required in the 'Supplementary Statement', schedules in the form indicated, marked with the number of the item to be explained, should be attached to this form.

TRUMBLE REFINING COMPANY

Explanatory Statement re Excess Profits Tax

"In making this return, we have classified ourselves as a business having a nominal capital, and have calculated our Excess Profits tax, in accordance with Section 209 of the War Revenue Act of October 3, 1917, at the rate of eight per cent of the net income in excess of $3,000.00.

"While the attached Balance Sheet discloses Capital Stock outstanding in the amount of $1,120,000.00, indicating a large capital investment, reference to the assets shows this amount to be practically offset by the two items 'Royalty Contracts' and 'Discount on Capital Stock', which were set up arbitrarily in the year 1915 as an offset to said stock.

"The Royalty Contracts, entered into with various oil companies for the use of a patented process for topping fuel oil, were retained by the Company when in 1915 the patents themselves were sold, and the royalties collected thereunder constitute the Company's only source of income. We are attaching hereto a complete statement of income for the taxable year and the year previous.

"The Balance Sheet and Statement of Income and Profit & Loss were prepared from the report of our auditors, Messrs. Haskins & Sells.

"TRUMBLE REFINING COMPANY OF ARIZONA

BALANCE SHEET, DECEMBER 31, 1917 and DECEMBER 31, 1916

ASSETS	DECEMBER 31, 1917	1916
ROYALTY CONTRACTS (Expiring 1928)	$ 811,821.36	$ 811,821.36
DISCOUNT ON CAPITAL STOCK . .	300,200.00	300,200.00
CURRENT ASSETS:		
Cash	32,714.04	35,226.75
Notes Receivable		1,200.00
General Petroleum Corporation — Royalties due	18,549.95	21,664.23
Miscellaneous Accounts Receivable . . .	335.65	767.38
Total Current Assets	51,599.64	58,858.36
OFFICE FURNITURE AND EQUIPMENT	804.40	1,007.89
PATENTED APPARATUS INSTALLED IN OIL PLANTS (ACTUAL VALUE, $1,000.00)	10,819.35	11,565.31
TOTAL	$1,175,244.75	$1,183,452.92
LIABILITIES		
PREFERRED CAPITAL STOCK . . .	$ 800,000.00	$ 800,000.00
COMMON CAPITAL STOCK	320,000.00	320,000.00
ACCOUNTS PAYABLE	1.00	24.65
DIVIDENDS DECLARED	32,000.00	32,000.00
PROFIT & LOSS SURPLUS	23,243.75	31,428.27
TOTAL	$1,175,244.75	$1,183,452.92

"TRUMBLE REFINING COMPANY OF ARIZONA

STATEMENT OF INCOME AND PROFIT & LOSS FOR THE YEARS ENDED DECEMBER 31, 1917 and 1916 AND COMPARISON

	YEAR ENDED DECEMBER 31, 1917			YEAR ENDED DECEMBER 31, 1916			INCREASE DECREASE
	Barrels	Royalty per Barrel – ¢	Amount	Barrels	Royalty per Barrel – ¢	Amount	
ROYALTIES:							
Santa Maria Plant	39,828.00	2–1/2	$ 995.70	66,694.00	2–1/2	$ 1,667.33	$ 671.63
Warner-Quinlan Plant	79,191.00	2	1,583.82	198,547.00	2	3,970.94	2,387.12
Warner-Quinlan Plant	34,859.00	1–1/2	522.88	70,723.00	1–1/2	1,060.81	537.93
General Petroleum Vernon Plant	6,003,389.00	1–1/2	90,050.81	5,513,662.00	1–1/2	82,704.92	7,345.89
General Petroleum Nevada Plant	6,327.00	1	63.27	21,339.00	1	213.39	150.12
General Petroleum Olinda Plant	5,640.00	1	56.40	67,365.00	1	673.65	617.25
General Petroleum Sibyl Plant	27,390.00	1	273.90	27,841.00	1	278.41	4.51
North American Plant, Section 16	144,675.07	1/2	723.39	176,508.60	1/2	882.56	159.17
Pan American Plant, Section 22	445,885.09	1/2	2,229.42	604,662.60	1/2	3,023.32	793.90
Total	6,787,184.16		$ 96,499.59	6,747,342.20		$ 94,475.33	$ 2,024.26
GENERAL EXPENSES:							
Salaries			$ 3,648.00			$ 4,890.50	$ 1,242.50
Rent			810.00			1,145.00	335.00
Office and Miscellaneous Expenses			244.87			914.03	669.16
Professional Services			241.40			282.50	41.10
General Taxes			1,681.85			1,348.09	333.76
Income Taxes			1,654.06			2,576.57	922.51
Depreciation on Apparatus and Equipment			1,407.45			1,801.76	394.31
Total General Expenses			$ 9,687.63			$ 12,958.45	$ 3,270.82
NET EARNINGS			$ 86,811.96			$ 81,516.88	$ 5,295.08
OTHER INCOME:							
Interest on Notes Receivable			$ 63.52			$ 122.55	$ 59.03
Interest on Bank Balances			$ 940.00			1,063.40	123.40
Total Other Income			$ 1,003.52			$ 1,185.95	$ 182.43
PROFIT FOR THE PERIOD			$ 87,815.48			$ 82,702.83	$ 5,112.65
SURPLUS AT BEGINNING OF PERIOD			31,428.27			44,725.44	13,297.17
PROFIT & LOSS SURPLUS BEFORE DEDUCTING DIVIDENDS			$119,243.75			$127,428.27	$ 8,184.52
DIVIDENDS DECLARED			96,000.00			96,000.00	
PROFIT & LOSS SURPLUS AT END OF YEAR			$ 23,243.75			$ 31,428.27	$ 8,184.52"

EXHIBIT "B"

"REC'D 4-5 48751098
Apr. 20, 1918
Sixth Dist.—Calif.

CORPORATION EXCESS PROFITS TAX RETURN

CAUTION

Read all instructions.
Answer all questions.
If necessary, ask your Collector of Internal Revenue for Assistance

(Do not write in this space)
Received
List.
Month Page Line
Audited by

Taxable year ended December 31, 1917

Name: Trumble Refining Company of Arizona.

Business Address: Higgins Building, Los Angeles, Calif.

Kind of business: Licensing use of oil refining apparatus.

Date established: July 13, 1910

GENERAL INSTRUCTIONS.

General Instructions omitted as immaterial

SCHEDULE I.—Net Income for Taxable Year Subject to Excess Profits Tax.

1. Net income for taxable year shown in Item 8, Form 1031 . . . . . $89,469.54

2.	Plus Interest on obligations of the United States issued since September 24, 1917, held by corporation in excess of $5,000.00 par value	.....
3.	Total	.....
4.	Less: (a) Dividends received as shown in Item 3d, Form 1031	.....
5.	(b) Interest paid (not in excess of legal limits) on indebtedness incurred for purchase of obligations reported in item 2, above	
6.	Net income subject to excess profits tax	$89,469.54

SCHEDULE II. Invested Capital.

Item	1911	1912	1913	Taxable year
1. Capital, surplus, and undivided profits at the close of the preceding year as shown by corporation's books before making any adjustments therein (from Schedule A)			This return is made on the basis of a business having a nominal capital, and the tax figured at the rate of 8% of the net income in excess of $3,000.00, in ac-	
2. Adjustments by way of additions (from Schedule B)				
3. Total				

(continued)

SCHEDULE II. (Continued)

Item	1911	1912	1913	Taxable year
4. Adjustments by way of deductions (from Schedule C)				cordance with Section 209 of the War Revenue Act of October 3, 1917—See explanatory statement attached.
5. Invested capital at beginning of year (Item 3 less Item 4)				
6. Changes in invested capital during year (from Schedules D and E) .				
7. Invested capital for year				
8. Total invested capital for prewar period				

SCHEDULE III. Deduction.

1. Percentage—net income to invested capital for prewar period. (Item 6, Schedule F, divided by Item 8, Schedule II. Carry out result as far as desired, but drop the remainder, if any, without increasing the last figure of the percentage	.....%
2. Percentage to be used in computing deduction (see Instruction 5)	.....%
3. Amount of deduction computed at above rate on invested capital for taxable year	$.....
4. Exemption (except for foreign corporations	3,000.00
Total deduction	$3,000.00

SCHEDULE IV. Computation of Tax

Classes of Income for Computation of Tax		Amount of income in each class	Deduction (if in excess of 15 per cent of invested capital, enter only 15 per cent on first line and balance on line or lines below.	Balance subject to tax	Rate	Amount of tax
Over	But not over					
1	2	3	4	5	6	7
$0.00	~~15% of invested capital~~	$89,469.54	$3,000.00	$86,469.54	8%	$6,917.56
15% of invested capital	20% of invested capital				25%	
20% of invested capital	25% of invested capital				35%	
25% of invested capital	33% of invested capital				45%	
33% of invested capital					60%	
Total		$.....	$.....	$.....	x x	$.....

SCHEDULE A.—Capital, Surplus, and Undivided Profits as Shown by Books Before Making any Adjustments Therein.

A4. Stock actually outstanding (not in the corporation treasury) at the end of the preceding taxable year may be counted as invested capital to the extent that it is paid up.

A6. Reserves consisting of amounts not deductible in the computation of net income under the income tax law, may, if properly explained, be included as part of the surplus for the purpose of computing the invested capital.

Item	1911	1912	1913	Taxable year
Capital stock paid up and actually outstanding at the close of the preceding year (not including treasury stock):				
1. First preferred	$.....	$.....	$.....	$545,800.00
2. Second preferred	.....	.....	.....	.....
3. Common	.....	.....	.....	274,000.00
4. Total	$.....	$.....	$.....	$819,800.00
Surplus and undivided profits:				
5. Paid-in surplus	$.....	$.....	$.....	$.....
6. Earned surplus	.....	.....	.....	31,428.27
7. Undivided profits	.....	.....	.....	.....
8. Grand total of items 4, 5, 6 and 7	$.....	$.....	$.....	$851,228.27

SCHEDULE B.—Adjustments by Way of Additions.

B1. If any part of the interest on the corporation's permanent indebtedness was excluded as a deduction from the corporation's income for any year (see Form 1031), a proportionate part of such indebtedness may be added to invested capital for that year as Item 1, Schedule B.

B2. If any addition to invested capital is reported in Item 2, Schedule B, submit a full statement showing the kind of property, the date when paid in, its value on that date, and how the value was determined.

B3. If an addition to invested capital is reported in Item 3, Schedule B, submit a statement showing the kind of property, its cost, and the year in which it was acquired.

B4. If any addition to invested capital is reported in Item 4, Schedule B, state specifically the amount of de-

preciation or depletion written off each year in the books of the company and the amount allowed as a deduction in computing taxable income.

Item	1911	1912	1913	Taxable year
1. Proportion of permanent indebtness, the interest on which is not deductible from income in computing income tax (Article 44)	$.....	$.....	$.....	$.....
2. Value of tangible property in excess of par value of stock issued therefor (Article 63) .	.....	.....	.....	.....
3. Additions to capital account allowable under Article 64 .	.....	.....	.....	.....
4. Depreciation charged in accounts of corporation but disalllowed by Treasury Department as expense on income tax returns	.....	.....	.....	.....
5.	.....	.....	.....	.....
6.	.....	.....	.....	.....
7. Total	$.....	$.....	$.....	$.....

SCHEDULES C, D, E AND F omitted as immaterial.

"QUESTIONS

1. Explain the nature of the corporation's business if not adequately described on first page:
   (a) Main business .....
   .....
   (b) Collateral business, if any .....
   .....
   .....
2. Date of incorporation .....
3. Under the laws of what State or country?.....

4. Enter on the following lines the names and addresses of three representative concerns in your locality engaged in the same kind of business.....

.....

.....

5. What was the fair value of the total capital stock of the corporation as determined in the last assessment of the capital stock tax (if any)? Specify the year .....

6. If any patent is included among your assets, attach a schedule to this return showing for each patent its serial number, date of issue, name of patentee, amount of cash or stock paid therefor, and its present book value .....

7. If the corporation ever took over a going business or otherwise acquired a mixed aggregate of tangible property, patents, and copyrights, and good will and other similar intangible property, and paid for such property in whole or in part with stock or other securities, submit a statement showing—

   (a) The name of the concern taken over (or from which the property was acquired).

   (b) The nature of the assets and liabilities so acquired.

   (c) The total par value of the stock issued therefor.

   (d) The value at which each class of assets was carried on the books of the concern from which acquired. (If obtainable submit a balance sheet of the predecessor corporation as at the date of acquisition.)

(e) The value at which each item was entered on the books of the corporation making this return. The different classes of property must be valued as prescribed by article 59 of the Excess Profits Tax Regulations and the values so obtained must be used in making adjustments 1, 2 and 3, Schedule C.

If patents or copyrights were acquired, state the basis on which their value was determined, and how they were paid for.

If good will or other intangible assets were acquired, state the basis on which their value was determined, and how they were paid for.

8. Is the corporation affiliated with one or more other corporations within the meaning of Article 77 of the Excess Profits Tax Regulations?..... If so, submit a statement describing all of its intercorporate relationships.

.....

.....

.....

9. Is this return a consolidated return within the meaning of Article 78 of the Excess Profits Tax Regulations? ..... If so, submit a schedule showing in detail the computation of the consolidated invested capital and income.

10. If the corporation was not in existence during the whole of any one of the calendar years 1911-1913, is its business substantially a continuation of a business carried on during any one or more of those years? ..... If so, give name under which, and address at which, its business was then carried on .....

.....

11. Submit a copy, in detail, of—

(a) The balance sheet of the corporation at the beginning of the taxable year.

(b) The balance sheet of the corporation at the close of the taxable year.

We, the undersigned, president and treasurer of the above-named company, being severally duly sworn, each for himself deposes and says that the foregoing return, including the accompanying schedules and statements (if any), has been examined by him and is to the best of his knowledge and belief a true and complete return made in good faith pursuant to the Excess Profits Tax Regulations.

Sworn to and)
subscribed)
before me) this 19th day of April, 1918.

F. M. TOWNSEND,
President

A. J. GUTZLER,
~~Treasurer~~
Secretary

Seal of officer taking affidavit :

LOUIS W. GRATZ
Notary Public
in and for the County of
Los Angeles, State of
California.

(SEAL)

"REC'D – 4 –
Apr. 20, 1918
6th Dist.—California.

TRUMBLE REFINING COMPANY

EXPLANATORY STATEMENT RE EXCESS PROFITS TAX

"In making this return, we have classified ourselves as a business having a nominal capital, and have calculated our Excess Profits tax, in accordance with Section 209 of the War Revenue Act of October 3, 1917, at the rate of eight per cent of the net income in excess of $3,000.00.

"While the attached Balance Sheet discloses Capital Stock outstanding in the amount of $1,120,000.00, indicating a large capital investment, reference to the assets shows this amount to be practically offset by the two items 'Royalty Contracts' and 'Discount on Capital Stock', which were set up arbitrarily in the year 1915 as an offset to said stock.

"The Royalty Contracts, entered into with various oil companies for the use of a patented process for topping fuel oil, were retained by the Company when in 1915 the patents themselves were sold, and the royalties collected thereunder constitute the Company's only source of income. We are attaching hereto a complete statement of income for the taxable year and the year previous.

"The Balance Sheet and Statement of Income and Profit & Loss were prepared from the report of our auditors, Messrs. Haskins & Sells.

"TRUMBLE REFINING COMPANY OF ARIZONA

BALANCE SHEET, DECEMBER 31, 1917 AND DECEMBER 31, 1916

	DECEMBER 31 1917	1916
ASSETS		
ROYALTY CONTRACTS (Expiring 1928)	$ 811,821.36	$ 811,821.36
DISCOUNT ON CAPITAL STOCK . . .	$ 300,200.00	$ 300,200.00
CURRENT ASSETS:		
Cash	32,714.04	35,226.75
Notes Receivable		1,200.00
General Petroleum Corporation—Royalties due	18,549.95	21,664.23
Miscellaneous Accounts Receivable.	335.65	767.38
Total Current Assets	$ 51,599.64	$ 58,858.36
OFFICE FURNITURE & EQUIPMENT .	$ 804.40	$ 1,007.89
PATENTED APPARATUS INSTALLED IN OIL PLANTS (ACTUAL VALUE, $1,000.00)	$ 10,819.35	$ 11,565.31
TOTAL	$1,175,244.75	$1,183,452.92
LIABILITIES		
PREFERRED CAPITAL STOCK	$ 800,000.00	$ 800,000.00
COMMON CAPITAL STOCK	320,000.00	320,000.00
ACCOUNTS PAYABLE	1.00	24.65
DIVIDENDS DECLARED	32,000.00	32,000.00
PROFIT & LOSS SURPLUS	23,243.75	31,428.27
TOTAL	$1,175,244.75	$1,183,452.92

"TRUMBLE REFINING COMPANY OF ARIZONA

STATEMENT OF INCOME AND PROFIT & LOSS FOR THE YEARS ENDED DECEMBER 31, 1917 and 1916 AND COMPARISON

	YEAR ENDED DECEMBER 31, 1917			YEAR ENDED DECEMBER 31, 1916			
	Barrels	Royalty per Barrel - ¢	Amount	Barrels	Royalty per Barrel - ¢	Amount	INCREASE DECREASE
ROYALTIES:							
Santa Maria Plant	39,828.00	2-½	$ 995.70	66,694.00	2-½	$ 1,667.33	$ 671.63
Warner-Quinlan Plant	79,191.00	2	1,583.82	198,547.00	2	3,970.94	2,387.12
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General Petroleum Nevada Plant	6,327.00	1	63.27	21,339.00	1	213.39	150.12
General Petroleum Olinda Plant	5,640.00	1	56.40	67,365.00	1	673.65	617.25
General Petroleum Sibyl Plant	27,390.00	1	273.90	27,841.00	1	278.41	4.51
North American Plant, Section 16	144,675.07	½	723.39	176,508.60	½	882.56	159.17
Pan American Plant, Section 22	445,885.09	½	2,229.42	604,662.60	½	3,023.56	794.14
Total	6,787,184.16		$96,499.59	6,747,342.20		$94,475.33	$ 2,024.26
GENERAL EXPENSES:							
Salaries			$ 3,648.00			$ 4,890.50	$ 1,242.50
Rent			810.00			1,145.00	335.00
Office and Miscellaneous Expenses			244.87			914.03	669.16
Professional Services			241.40			282.50	41.10
General Taxes			1,681.85			1,348.09	333.76
Income Taxes			1,654.06			2,576.57	922.51
Depreciation on Apparatus and Equipment			1,407.45			1,801.76	394.31
Total General Expenses			$ 9,687.63			$ 12,958.45	$ 3,270.82
NET EARNINGS			$ 86,811.96			$ 81,516.88	$ 5,295.08
OTHER INCOME:							
Interest on Notes Receivable			$ 63.52			$ 122.55	$ 59.03
Interest on Bank Balances			940.00			1,063.40	123.40
Total Other Income			$ 1,003.52			$ 1,185.95	$ 182.43
PROFIT FOR THE PERIOD			$ 87,815.48			$ 82,702.83	$ 5,112.65
SURPLUS AT BEGINNING OF PERIOD			31,428.27			44,725.44	13,297.17
PROFIT & LOSS SURPLUS BEFORE DEDUCTING DIVIDENDS			$119,243.75			$127,428.27	$ 8,184.52
DIVIDENDS DECLARED			96,000.00			96,000.00	
PROFIT & LOSS SURPLUS AT END OF YEAR			$ 23,243.75			$ 31,428.27	$ 8,184.52"

EXHIBIT "C"

"A-2 letter.

TREASURY DEPARTMENT,
Washington, D. C.

Office of the
Commissioner of
Internal Revenue.
IT:T:SM
EMA-48751098

February 21, 1920.

"Trumble Refining Company,
Higgins Building,
Los Angeles, California.

Sirs:

"Reference is made to your income and excess profits tax returns for the year ended December 31, 1917, which were originally filed and the tax computed as prescribed in Section 209 of the Act of October 3, 1917. You are advised that after careful consideration of the facts as set forth in your statements filed with the returns, together with other data submitted, it is the opinion of this Bureau that your business is of such a character as normally to require a substantial capital investment and the income is attributable to the employment of capital. Therefore, the assessment under the provisions of Section 209 of the Act of October 3, 1917, has been disallowed.

"However, it has been found that, owing to the fact that a large part of the invested capital cannot be in-

cluded under the statutory requirements for tax purposes, your case has been given consideration under the provisions of Section 210 of the same Act and Articles 18, 24 and 52 of Regulations 41, which provide that an excess profits tax may be based on a comparison with a group of concerns engaged in a like or similar line of business which in their general character are comparable as to the several component parts influencing the tax liability to your company.

"The tax thus determined after giving effect to necessary changes in net income developed through audit of the returns, indicates a constructive capital of $410,253.01 with an allowance deduction of seven per cent plus $3,000.00 and a net income of $89,469.54, specific details of which are as follows:

"Invested capital (constructive)		$410,253.01
Deduction—7% plus $3,000.00		31,717.71
Net income as reported		89,469.54
Computation of Tax		
Excess profits tax		$ 13,688.84
Net income	$89,469.54	
Less: Excess profits tax	13,688.84	
Amount on which income tax at 2% and 4% is calculated	$75,780.70	
2% tax		$ 1,515.61
4% tax		3,031.23
Total tax assessable		$ 18,235.68
Original assessment		11,870.68
Indicating additional tax		$ 6,365.00

"Your attention is directed to the fact that Section 210 of the Act of October 3, 1917, makes no provision for computing the invested capital and its construction under Article 18 of Regulations 41 is only an incident in the assessment of the tax. The capital stated should not be used either as a basis in making any changes in the books of the corporation or making any future returns.

"You will be advised by the Internal Revenue Collector for your district as to the time and manner of payment of the above additional tax.

Respectfully,

(signed) G. V. NEWTON,
Acting Assistant to the Commissioner."

EXHIBIT "D"

"CLAIM FOR ABATEMENT

Taxes Erroneously or Illegally Assessed

State of.....)
) ss
County of .....)

IMPORTANT

: This claim should be forwarded to the Collector of Internal Revenue from whom notice of assessment was received.

(HOLD FOR CLAIM)
(FOR REFUND)

: Date of filing to be .....

RECEIVED
JUN. 18, 1920
U. S. INT. REV.
6th CAL.

plainly stamped here

Write name so it can be easily read

TRUMBLE REFINING COMPANY OF ARIZONA

(Name of claimant)

HIGGINS BUILDING—Los Angeles, California.

(Address of claimant; give street and number as well as city or town, and State.)

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant: Leasing use of refinery process.
2. Character of assessment or tax: Income and Profits Taxes, 1917.
3. Amount of assessment: $6,365.00
4. Amount now asked to be abated . . . $6,365.00

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

We hereby claim abatement of tax assessed for the reasons set forth in letter attached hereto.

	RECEIVED
	APR 21, 1930
(SEAL)	Section G
	Audit Review Division

Sworn to and subscribed before
me this 17th day of June 1920:
LOUIS W. GRATZ
Notary Public
in and for the County of Los
Angeles, State of California.

Signed:

(Write name
(so it can
(be easily
(read

TRUMBLE REFINING COMPANY
Per A. J. GUTZLER,
Secretary

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue without charge.)

CERTIFICATE OF ASSESSMENT

I certify that an examination of the records of the Commissioner's Office shows the following facts as to the assessment and payment of the tax:

Name and Address	Character of assessment or article taxed	Period covered by assessment	List	Year	Month	Page	Line	Amount
Trumble Refining Co. of Arizona, Higgins Bldg., LA	Income	1917	IT	1920	May	30	4	6,365.00

(SEAL)

JOHN P. CARTER
Collector

.....
Assessment Clerk, Internal Revenue Bureau

Form 47 3

1

District: 6th Calif. 5

Abatement Order No. 9

Corp'n. 1917 5
(nature of tax)

Claimant: Trumble Refining Company of Arizona.

Address: L. A.

Examined and submitted for action: October 14, 1921
AE RBP 10/31/21

Claim examined by GB	Amount claimed:	$6,365.00	Committee on claims:
	Amount allowed:	$	
	Amount rejected:	$6,365.00	WM. R. CAMPBELL J. C. ROGERS FOD
Claim approved by A.H.F.			
Chief of Division	H.A.H.		RECEIVED AUG. 9, 1920: CLAIMS DIVISION
	No returns		

"IT:T:SM
EMA–48751098

Los Angeles, California.
June 16, 1920.

"Mr. G. V. Newton
Acting Assisting to the Commissioner
of Internal Revenue,
Treasury Department,
Washington, D. C.

Dear Sir:

"We acknowledge receipt of your letter of February 21, 1920 with reference to our Income and Excess Profits Tax returns for the year ended December 31, 1917.

"We note your decision that our business should be classified as a concern normally requiring a substantial capital investment and that, therefore, assessments, under provision of Section 209 of the Act of October 3, 1917, had been disallowed.

"Before filing this return we endeavored to secure from your department a decision such as the above to guide us in the preparation of the return, but were unable to do so. However, regulations subsequent to the date of filing our 1917 return had already led us to the conclusion that we were in error in filing under Section 209 and the returns for 1918 and 1919 were filed in accordance with the regular provisions governing returns of concerns with invested capital.

"We have prepared and submit herewith a revised return for 1917, the total tax on which amounts to $2,120.88. This amount differs from the amount of tax calculated by you principally because of the fact that we have deducted from income previously reported depreciation on

account of the expiring life of the royalty contracts in the amount of $54,121.42 being one-fifteenth of the fair market value of said contracts on March 1, 1913.

"We respectfully request a refund of the amount of $9,749.80, representing the difference between the amount paid, viz., $11,870.68, and the tax shown in the amended return attached hereto, $2,120.88. We also claim abatement of additional tax of $6,365.00 assessed in accordance with your letter.

"In order that you may have complete information with which to review the attached amended return, we submit the following facts with respect to the organization and history of this company.

"The Trumble Refining Company was incorporated July 13, 1910 with an authorized capital stock of $5,000,000.00, divided into 4,000,000 shares of common stock of $1.00 each and 1,000,000 shares of preferred stock of $1.00 each.

"The company immediately acquired from M. J. Trumble and F. M. Townsend all their rights in certain patents covering a process for refining petroleum, issuing in payment therefor 1,951,960 shares of common stock and 518,400 shares of preferred stock. Subsequently there was sold 1,248,040 shares of common stock and 281,600 shares of preferred stock for a consideration of $135,-355.25, making a total outstanding capital stock of 3,200,000 common and 800,000 preferred.

"The proceeds from the sale of stock were expended in the development of patents or in obtaining patents in foreign countries. By the year 1913, numerous contracts had been entered into for the use of these patents, and for the year 1913 the net income of the company amounted to $30,438.06 and for 1914, $39,860.49.

"In 1915 the company sold to the Shell Company for $1,000,000.00 all of its letter patents of the United States and patents pending in the United States, together with all foreign rights thereto, the company retaining all contracts which were then in existence, representing business which had been developed. These contracts were entered on the books at a value of $811,821.36, which was considered a fair value by the officers of the company, as this asset would not have been sold for less than that figure at the time. This value is substantiated by subsequent royalties received therefrom as follows:

Year 1916	$94,475.33
Year 1917	96,499.59
Year 1918	80,456.50
Year 1919	84,761.37

"From the date of sale of the patent rights, the company was in process of liquidation, as these patents had an average life from March 1, 1913 of fifteen years, and at the end of that time royalties from the contracts would cease.

"The value of these contracts, $811,821.36, should, therefore, be amortized over this period at the rate of $54,121.44 annually, to insure the return of the capital to the stockholders.

"If the facts disclosed in this claim will not afford full relief and refund of the amount claimed, we respectfully request a full investigation of this claim before final action is taken.

Very truly yours,

(signed) A. J. GUTZLER"

EXHIBIT "E"

"RECEIVED
JUN 18, 1920
U. S. INT. REV. 6th CAL.

AMENDED CORPORATION INCOME TAX RETURN
(FOR ALL CORPORATIONS EXCEPT RAILROAD AND INSURANCE COMPANIES)

CAUTION	(Do not write in this space)
Read this form and all instructions carefully and fill in supplementary statement on back of return first. Total in supplementary statement must agree with totals on face of return.	Received List Month Page Line Audited by 48,751,098

Return of annual net income for the
(calendar year 1917.
(~~fiscal year ended.....19.....~~

Name of corporation: Trumble Refining Company of Arizona.

Principal office: 916 Higgins Building, Los Angeles, California.

Kind of Business carried on: Leasing of oil refining process.

Date of organization: .....

1. Total amount of paid-up capital stock outstanding at the close of the year, or if there is no capital stock the capital other than interest-bearing indebtedness employed in the business at the close of the year. Unissued or treasury stock must not be included in this item, but only stock actually issued and outstanding at the close of the year for which this return is made.

(a) Paid-up 'common stock'	$274,000.00
(b) Paid-up 'preferred stock'	545,800.00
Total paid-up stock	$819,800.00
or (c) Capital employed in business . . .	$

2. Total amount of bonded or other interest-bearing indebtedness outstanding at the close of the year, exclusive of indebtedness wholly secured by collateral the subject of sale or hypothecation in the ordinary business of the company and exclusive also of indebtedness incurred in the purchase of securities, the income from which is not subject to income tax.

Character of obligation	Rate of Interest	Principal
.....		$.....
.....		None
Total indebtedness		$.....

INCOME

3. (a)	Gross sales and other income from operations	$
(b)	Income from rentals, royalties, etc.	96,499.59
(c)	Income from interest (see item 3c on back of return)	1,003.52
(d)	Income from dividends (see item 3d on back of return)	
(e)	Income from all other sources (see item 3e on back)	
	Total gross sales and other income	$97,503.11

DEDUCTIONS

(See corresponding items on back of return.)

4. (a)	Cost of goods and other property sold .	$	
(b)	Expenses, general . .	4,944.27	
5. (a)	Losses sustained charged off		
(b)	Depreciation charged off	55,528.87	
(c)	Depletion charged off	ADDTL.	54,121.42
6. (a)	Interest paid (except as entered under 6b and c)		
(b)	Interest paid on deposits (for banks only)		

	(c) Interest paid on indebtedness wholly secured by collateral . . .		
7.	(a) Domestic taxes paid, not including income and excess profits taxes	1,681.85	
	(b) Foreign taxes paid .		
	Total deductions	62,154.99	
	Less total deductions . . .		62,154.99
8.	Total net income		$35,348.12
	Less: (a) Excess profits tax (item 12)		
	(b) Dividends received out of earnings of 1913, 1914, 1915		
	Total (a plus b)		.....
9.	(a) Amount taxable at 2% (item 8 less total of a plus b)		35,348.12
	(b) Amount taxable at 1% (item 8b)		.....
10.	Amount of total net income shown in item 8		.....
	Less: (a) Excess profits tax (item 12)		
	(b) Dividends received (item 3d)		
	Total (a plus b)		.....

11.	Amount taxable at 4% (item 10 less total of a plus b)	$35,348.12
	If return is made for a full fiscal year ended in 1917, compute tax on as many twelfths of item 11 as there are months from January 1, 1917, to the close of the fiscal year. Enter amount taxable here	.....

TAX

12.	Amount of excess profits tax (see instructions below)	$.....
13.	Amount of 2% tax (2% of item 9a) .	706.96
14.	Amount of 1% tax (1% of item 9b) .	
15.	Amount of 4% tax (4% of item 11) .	1,413.92
16.	Total tax assessable	$ 2,120.88

We, the undersigned, president and treasurer of the above-named company, whose return of net income is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief, true and correct in each and every particular.

TRUMBLE REFINING COMPANY OF ARIZ.

~~President~~

Per A. J. GUTZLER

Secretary

~~Treasurer~~

President out of city

Sworn to and subscribed before me) this 17th day of June, 1920.

Seal of officer taking affidavit :

(SEAL)

LOUIS W. GRATZ
Notary Public
In and for the county of Los Angeles, State of California.

GENERAL INSTRUCTIONS

General Instructions omitted as immaterial

SUPPLEMENTARY STATEMENT

The following information must be furnished, either on this sheet or on attached schedules, by every corporation, joint-stock company, or association. Without such information the return will not be accepted as complete. The items below relate to the correspondingly numbered items on the first page.

3. (c) FROM INTEREST.

Interest to be reported as income for the purpose of the income tax includes all interest received on bonds or securities owned by the corporation except interest on obligations of a State or political subdivision thereof or interest upon the obligations of the United States or its possessions.

3. (d) FROM DIVIDENDS RECEIVED.

Any distribution made or ordered to be made by a corporation out of its earnings or profits accrued since March 1, 1913, whether in cash or stock of the paying company, must be returned (under Item 3(d) on front page of this form) by the receiving corporation as income of the year in which the distribution was made or ordered to be made and will be taxed at the rates prescribed by law for the years in which surplus or profits distributed were earned, viz, 1% on amounts received out of earnings of 1913 (subsequent to March 1, 1913), 1914 and 1915, and 2% on amounts received from earnings of 1916 and 1917. A statement from the corporation paying the dividends included herein should be attached to this return, showing separately the amount of dividends paid out of earnings of each year: otherwise, they will be deemed to have been paid out of the earnings of 1917 and will be taxed 2%. The receiving corporation, in order that tax may be computed on dividends received in 1917 at the rates applicable to the years in which the profits were earned, must fill in the following form:

Dividends received in 1917 out of profits earned each year subsequent to March 1, 1913.

1913	1914	1915	1916	1917	Total
$.....	$.....	$.....	$.....	$.....	$.....

3. (e) FROM OTHER SOURCES.

Income received from all sources not elsewhere specified should be itemized below:

.....	$.....
.....NONE.....	.....
Total	$

4. (a) COST OF GOODS AND OTHER PROPERTY SOLD.

Report the cost of goods sold in the following form:

Merchandise bought for sale . . . . . $.....

Cost of manufacturing or otherwise producing goods (if separately shown on books). (Submit schedule showing principal items of cost) . . . .

Plus inventories at beginning of year . . ..

Total . . . . . N . . . $.....

Less inventories at end of year . O . . ..

Net cost of goods sold . . . . . N . $.....

E

Explanations .....

If the corporation makes inventories of merchandise or materials, explain the basis on which they are made, whether (a) at cost, or (b) at cost or market value, whichever is lower. If no inventories are made, make no entries referring to inventories, but report the total cost of goods purchased or produced during the year. If the cost of manufacturing or otherwise producing goods is not kept separate from general expenses in the corporation's accounts, include such cost in 'expenses, general', below.

Corporations dealing in real estate, and any corporation that has sold any of its capital assets during the taxable year, should report the cost of the property sold in the following form:

1.	Original cost of property	$.....
2.	Market value March 1, 1913, if acquired before that date	.....
3.	Cost of subsequent improvements, if any	N
4.	Depreciation and depletion to date of sale	O
5.	Net cost (item 1 or item 2 plus item 3 minus item 4)	N .....E.....
	State how market value March 1, 1913 was determined	.....

Does such value include any good will?
If so, how much? . . . . . $.....

4. (b) EXPENSES, GENERAL.

This item should include only the ordinary and necessary expenses paid within the year in the operation of the business and maintenance of the properties of the corporation, itemized as per schedule below. It must not include any expenditures reported under 4(a), 5, 6 or 7.

Expenditures for incidental repairs which do not add to the value or appreciably prolong the life of property are deductible as expenses, but expenditures for new buildings, permanent improvements or betterments which increase the value of property, or for restoring or replacing property, are not deductible under this or any other item of the return. Such expenditures are prop-

erly chargeable to capital account, to be extinguished through annual depreciation charges.

Payments made to officers or employees, who are stockholders, in the guise of salaries or compensation, the amount of which is based upon the stockholdings of such officers or employees, are not deductible as a business expense.

1. Salaries of officers	$2,400.00
2. Labor, wages, commissions, etc. (not included in 'Cost of manufacturing or otherwise, producing goods' under 4(a)) . .	.....
3. Rents, royalties, and other payments in lieu of rent	810.00
4. Repairs, ordinary and incidental . . .	.....
5. Other expenditures (classify): Office and misc. : expenses .	1,734.27
Total expenses	$4,944.27

If salaries were increased or extra compensation was paid to officers, state the amount, the reason therefor, and the basis on which computed.....

5. (a) LOSSES.

Losses deductible under this item must be distinguished from depreciation or allowances for exhaustion, wear and tear. The losses, not compensated by insurance or otherwise, must be absolute, complete, actually sustained during the year, and charged off on the books of the corporation.

Kind of property on which loss is claimed.	Cost of property	Cause of loss	Amount charged off within year
.....	$.....		$.....
.....	.....	NONE	.....
Total.....	$.....		$.....

When were the deducted losses ascertained to be such? .....

How were they so ascertained?.....

The cost of property loss should be determined as indicated in item 4(a).

A bad debt offsetting income accrued since January 1, 1909, will not be allowed as a deduction unless the amount was reported as income for the year in which the debt was created.

State how the debts charged off (if any) were ascertained to be worthless.....

If at any future time a debt charged off as worthless is collected the amount collected must be returned as income for the year in which received.

Unpaid debts are not deductible if made good by recovery of property sold or retention of property pledged.

5. (b) DEPRECIATION.

The amount deductible on account of depreciation is an amount charged off which fairly measures the loss during the year in the value of physical property by reason of exhaustion, wear and tear. Such amount should be determined upon the basis of the cost of the property and the probable number of years constituting its life. Stocks, bonds, and like securities, as well as any other intangible

assets, are not subject to exhaustion, wear and tear within the meaning of the law. Hence, any amount charged off as representing a shrinkage in the value of such assets is not deductible either as depreciation or as a loss.

Depreciation computed on total invoice value of merchandise in stock is not an allowable deduction by reason of damage or obsolescence the merchandise is unsalable.

If a deduction is made on account of depreciation, the following statement must be filled in:

Kind of property	Its cost	Probable life after acquirement	Amount of depreciation charged off	
			This year	Previous year
Patented apparatus	$ 21,689.12	8 years	$ 1,203.96	$10,123.81
Royalty contracts	811,821.36	15 years	54,121.42	
Office furniture	1,632.59		203.49	624.70
Totals	$835,143.07		$55,528.87	$10,748.51

If building, state under 'kind of property' the material of which constructed.

5. (c) DEPLETION.

Depletion applies to the exhaustion of natural deposits, and contemplates a deduction to return to the corporation the capital invested, or in case of purchase prior to March 1, 1913, an amount sufficient to return to the corporation the fair market price or value of such deposits as of that date. An allowable deduction on account of depletion must not exceed the fair market value as of March 1, 1913, or the cost subsequent to that date, of the product mined and sold during the year, and will be determined

in accordance with the rule set out in Articles 170 to 173, Regulations 33, Revised. The amount sought to be deducted on this account must be charged off on the books of the company.

*Kind of property	Its cost if acquired subsequent to March 1, 1913	#Fair market value as of March 1, 1913	Amount of depletion charged off	
			This year	Previous year
	$	$	$	$
NONE				

*Coal, iron ore, copper, oil, or gas.

#State how fair market value as of March 1, 1913, was determined?.....

6. INTEREST PAID.

(a) The amount of interest deductible under (a) is the amount actually paid within the year on an amount of bonded or other indebtedness (except on indebtedness falling under 6(b) or 6(c) and indebtedness incurred for the purchase of obligations or securities the income from which is exempt from income tax) not in excess of the paid-up capital stock outstanding at the close of the year, or if there is no capital stock, the entire amount of capital (not including interest-bearing indebtedness) employed in the business at the close of the year, plus, in each case, one-half of the interest-bearing indebtedness also then outstanding.

Capital employed in the business, as here used, contemplates the entire capital paid in by the members of the company, including so much of the accumulated surplus as is actually employed in the business, but does not in-

clude any borrowed capital or interest-bearing indebtedness.

(c) Interest paid (by banks) on deposits or on money received for investment and secured by interest-bearing certificates of indebtedness issued by a bank, banking association or loan or trust company is deductible in the entire amount so paid.

(c) If the corporation's indebtedness, or any part thereof, is wholly secured by collateral which is the subject of sale or hypothecation in the corporation's ordinary business as a dealer in such property, the interest paid on an amount of such indebtedness not exceeding the actual value of the collateral may be deducted.

Describe all obligations on which interest is paid in the following form. Distinguish plainly collateral loans falling under 6(c) and also obligations incurred for the purchase of securities, the income from which is exempt from income tax.

Kind of obligation	Amount of principal	Rate of interest	Amount of interest paid
	$		$
NONE			
Total	$		$

7. (a) TAXES PAID.

Taxes, paid or accrued on the books of the corporation during the taxable year, are deductible with the following exceptions: Federal income and excess profits taxes (including taxes paid on the interest on its own obligations

in pursuance of a covenant contained therein relieving the holder of liability for such taxes), foreign taxes on income derived from sources within the United States by foreign corporations, local taxes specially assessed against property on account of benefits derived from public improvements or betterments, and taxes upon the corporation's capital stock in the hands of the stockholders.

BASIS OF RETURN.

Is this return made on the basis of actual receipts and disbursements? .....

If not, describe fully what other basis or method was used in computing net income.....

UNDISTRIBUTED INCOME, SURPLUS, AND UNDIVIDED PROFITS.

Total net income of taxable year preceding that for which this return is made (less income tax paid thereon)	$
Amount of such income remaining undistributed six months after the close of that year	
Amount of such income remaining undistributed twelve months after the close of that year	
Total surplus and undivided profits at close of taxable year	$

If sufficient space is not provided for the entry of any information required in the 'Supplementary Statement', schedules in the form indicated, marked with the number of the item to be explained, should be attached to this form.

CORPORATION EXCESS PROFITS TAX RETURN

CAUTION	(do not write in this space)
Read all instructions.	
Answer all questions.	
If necessary, ask your Collector of Internal Revenue for assistance	Received .....
	List .....
	Month Page Line .....
	.....
	Audited by .....
	48,751,098

Taxable year ended December 31, 1917

Name: Trumble Refining Company

Business Address: .....

Kind of Business.....Date established 1910

GENERAL INSTRUCTIONS

General Instructions omitted as immaterial.

SCHEDULE I. Net income for Taxable Year Subject to Excess Profits Tax.

1.	Net income for taxable year shown in Item 8, Form 1031	$89,469.54
2.	Plus interest on obligations of the United States issued since September 24, 1917, held by corporation in excess of $5,000.00 par value	
3.	Total	$

4. Less: (a) Dividends received as shown in Item 3d, Form 1031 . . . $

5. (b) Interest paid (not in excess of legal limit) on indebtedness incurred for purchase of obligations reported in item 2, above . . . . .

6. Net income subject to excess profits tax $89,469.54

SCHEDULE II. Invested Capital.

Item	1911	1912	1913	Taxable year
1. Capital, surplus and undivided profits at the close of the preceding year as shown by corporation's books before making any adjustments therein (from Schedule A) .	$.....	$.....	$.....	$851,228.27
2. Adjustments by way of additions (from Schedule B) . . .	.....	.....	.....	
3. Total	$.....	$.....	$.....	$851,228.27
4. Adjustments by way of deductions (from Schedule C) . . .	.....	.....	.....	811,821.36

5. Invested capital at beginning of year (Item 3 less Item 4) . . .	$.....	$.....	$.....	$ 39,406.91
6. Changes in invested capital during year (from Schedules D and E)	.....	.....	.....	.....
7. Invested capital for year	$.....	$.....	$.....	$ 39,406.91
8. Total invested capital for prewar period				$

SCHEDULE III. Deduction.

1. Percentage—net income to invested capital for prewar period. (Item 6, Schedule F, divided by Item 8, Schedule II. Carry our result as far as desired, but drop the remainder, if any, without increasing the last figure of the percentage)	.....%
2. Percentage to be used in computing deduction (see Instruction 5)	.....%
3. Amount of deduction computed at above rate on invested capital for taxable year	$
4. Exemption (except for foreign corporations)	$3,000.00
Total deduction	

SCHEDULE IV. Computation of Tax

Classes of Income for Computation of Tax		Amount of income in each class	Deduction (if in excess of 15 per cent of invested capital, enter only 15 per cent on first line and balance on line or lines below	Balance subject to tax	Rate	Amount of tax
Over	But not over					
1	2	3	4	5	6	7
$0.00	15% of invested capital	.....	.....	.....	25%	.....
15% of invested capital	20% of invested capital	$.....	$.....	$.....	20%	$.....
20% of invested capital	25% of invested capital	$.....	$.....	$.....	35%	$.....
25% of invested capital	33% of invested capital	.....	.....	.....	45%	.....
33% of invested capital		.....	.....	.....	60%	.....
Total		$.....	$.....	$.....	xx	$.....

SCHEDULE A. Capital, Surplus, and Undivided Profits as Shown by Books Before Making any Adjustments Therein.

A4. Stock actually outstanding (not in the corporation treasury) at the end of the proceding taxable year may be counted as invested capital to the extent that it is paid up.

A6. Reserves consisting of amounts not deductible in the computation of net income under the income tax law, may, if properly explained, be included as part of the surplus for the purpose of computing the invested capital.

Item	1911	1912	1913	Taxable year
Capital stock paid up and actually outstanding at the close of the preceding year (not including treasury stock):				
1. First preferred . .	$.....	$.....	$.....	$545,800.00
2. Second preferred . .	.....	.....	.....	
3. Common	.....	.....	.....	274,000.00
Total	$.....	$.....	$.....	$819,800.00
Surplus and undivided profits:				
5. Paid-in surplus . .	$.....	$.....	$.....	$
6. Earned surplus . .	.....	.....	.....	
7. Undivided profits . .	.....	.....	.....	31,428.27
8. Grand total of items 4, 5, 6 and 7 . . .	$.....	$.....	$.....	$851,228.27

SCHEDULE B. Adjustments by Way of Additions.

B1. If any part of the interest on the corporation's permanent indebtedness was excluded as a deduction from the corporation's income for any year (see Form 1031), a proportionate part of such indebtedness may be added to invested capital for that year as Item 1, Schedule B.

B2. If any addition to invested capital is reported in Item 2, Schedule B, submit a full statement showing the kind of property, the date when paid in, its value on that date, and how the value was determined.

B3. If an addition to invested capital is reported in Item 3, Schedule B, submit a statement showing the kind of property, its cost, and the year in which it was acquired.

B4. If any addition to invested capital is reported in Item 4, Schedule B, state specifically the amount of depreciation or depletion written off each year in the books of the company and the amount allowed as a deduction in computing taxable income.

Item	1911	1912	1913	Taxable year
1. Proportion of permanent indebtedness, the interest on which is not deductible from income in computing income tax (Article 44)	$.....	$.....	$.....	$.....
2. Value of tangible property in excess of par value of stock issued therefor (Article 63)	.....	.....	.....	.....
3. Additions to capital account allowable under Article 64 . . .	.....	.....	.....	.....

N O N E

4. Depreciation charged in accounts of corporation but disallowed by Treasury Department as expense on income tax returns . .	.....	.....	.....	.....
5.	.....	.....	.....	.....
6.	.....	.....	.....	.....
7. Total	$.....	$.....	$.....	$.....

SCHEDULE C. Adjustments by Way of Deductions.

C1. Is any good will, trade-mark, trade brand, franchise, or similar intangible property, paid in for stock, entered on the books of the corporation at a value in excess of its actual cash value when paid in? *Cannot tell In excess of the par value of the stock issued therefor? * In excess (in aggregate) of twenty per cent of the par value of the stock outstanding on March 3, 1917? *See letter of explanation attached.

If so, submit a statement showing (a) date of acquisition; (b) cash value at that date; (c) par value of stock issued therefor; (d) par value of total stock outstanding on March 3, 1917; and (e) value at which the assets are entered on the books of the corporation.

The amount by which 'e' exceeds 'b), 'c' or twenty per cent of 'd', whichever is lowest, must be entered as Item 1, Schedule C, for the taxable year and for each year of the prewar period that is affected.

C2. Is any patent or copyright, paid in for stock, entered on the books of the corporation at a value in excess of its actual cash value when paid in? No In excess of the par value of the stock issued therefor? No

If so, submit a statement showing (a) date of acquisition; (b) cash value of the patent or copyright at that date; (c) par value of the stock issued therefor; and (d) value at which the patent or copyright is entered on the books of the corporation.

The amount by which 'd' exceeds 'b' or 'c', whichever is the lower, must be entered as Item 2, Schedule C, for the taxable year and for each year of the prewar period that is affected.

C3. Is any tangible property, paid in for stock, entered on the books of the corporation at a value in excess of its actual cash value when received No In excess of the par value of the stock paid therefor? No

Is any tangible property paid for specifically with stock before January 1, 1914, entered on the books of the corporation at a value in excess of its actual cash value on that date? .....

If the answer to any of the foregoing questions is 'yes', submit a statement showing (a) kind of property; (b) when acquired; (c) par value of the stock paid therefor; (d) actual cash value of the property when paid in; (e) actual cash value of the property on January 1, 1914, if paid in before that date; (f) basis of the valuation stated under 'e'; (g) value at which the property is entered on the corporation's books; and (h) amount by which such value exceeds the allowable value under Article 55 of the Excess Profits Tax Regulations. Enter this amount as Item 3, Schedule C, for the taxable year

and for each year of the prewar period that is affected. (Note that the value January 1, 1914, does not affect the prewar period.)

C4. (a) Was any stock issued by the corporation ever returned as a gift or for a consideration substantially less than its par value? No (b) If so, what was the par value of such stock? ..... (c) What amount of cash or its equivalent was derived from the resale of such stock? $ None

The excess of 'b' over 'c' must be entered as Item 4, Schedule C, for the taxable year and for each year of the prewar period that is affected.

C5. Was the business reorganized or consolidated, or was its ownership changed after March 3, 1917? No If so, answer the following questions:

(a) Did an interest in the business of fifty per cent or more remain in the control of the same persons, corporations, associations, or partnerships, or of any of them? .....

(b) Were any of the assets entered on the books of the corporation making this return at a higher value than on the books of its predecessor? .....

(c) If so, were such assets paid for specifically as such in cash or tangible property? .....

The increase in book value of any property not so paid for must be deducted from the invested capital for the taxable year as Item 5, Schedule C, unless it can be shown that under the excess profits law and regulations the property was undervalued on the books of the predecessor business.

C6. Is any property paid for with cash or with other tangible property entered on the books of the corporation

at a value in excess of the amount of cash paid therefor or the actual cash value of the tangible property paid therefor? No If so, submit a statement showing (a) kind of property; (b) amount of cash paid therefor; (c) actual cash value of other tangible property paid therefor; (d) How that value was determined; (e) value at which the property is entered on the books of the corporation; and (f) excess of 'e' over 'b' or 'c'. This excess must be entered as Item 6, Schedule C, for the taxable year and for each year of the prewar period that is affected.

C7. Has adequate provision been made in the expense accounts of the company for (a) losses of every kind? .....; (b) depreciation? .....; (c) Obsolescence? .....; (d) depletion of mineral deposits, timber supplies and the like? .....

If adequate charge has not been made for depreciation, depletion, obsolescence, and other losses, and the value of the property has not been maintained by replacements that have been charged to expense, proper additional charges for depreciation must be computed for all years in which they were not made on the books, and the total amount of such charges must be entered as Item 7, Schedule C, for the taxable year (and for each year of the prewar period that was affected) and deducted in arriving at its surplus and undivided profits.

C8. Has the corporation any stocks, bonds (other than obligations of the United States), or other assets, the income from which is not subject to excess profits tax? No If so, at what value are they carried on the corporation's books? $..... Has any portion of such assets been included in invested capital in accordance with Articles 45 and 46 of the Excess Profits Tax Regu-

lations? ..... If so, how much? $..... Is the balance in excess of the corporation's indebtedness, excluding the amount thereof that has been included in invested capital as Item 1, Schedule B? ..... If so, state the amount of such excess. $.....

Enter this amount as Item 8 in Schedule C, for the taxable year, and make a similar correction for each year of the prewar period.

Adjustment on Account of (See corresponding instructions on page 2)	1911	1912	1913	Taxable year
1. Valuation of good will, trade-marks, trade brands, franchises, or other intangible property purchased with stock (Articles 57 and 58)	See letter of explanation attached.			$811,821.36
2. Valuation of patents and copyrights paid in for stock (Article 56)	.....	.....	.....	
3. Valuation of tangible property paid in for stock (Article 55)	.....	.....	.....	
4. Stock returned to corporation as a gift, etc. (Article 54) .	.....	.....	.....	
5. Valuation of assets acquired in reorganizations (Article 50)	.....	.....	.....	

6. Appreciation (Article 42)	.....	.....	.....	
7. Depreciation and depletion (Article 42)	.....	.....	.....	
8. Excess of stocks and other inadmissible assets over indebtedness (Article 44)	.....	.....	.....	
9.	.....	.....	.....	
10.	.....	.....	.....	
11. Total deductions .	$.....	$.....	$.....	$811,821.36

SCHEDULE D. Changes in Invested Capital During Taxable Year.

Specify (by using red ink for distributions, or otherwise) whether each item represents an addition or a distribution.

Report dividends paid out of profits of prior years but not dividends paid out of profits of the taxable year.

In column 4 enter the number of whole months remaining in the year, plus a fraction consisting of the number of days remaining in the month (including the date of change) divided by the total number of days in the month.

Assets (other than cash) paid in for stock, must be valued in accordance with Articles 55 to 60 of the Excess Profits Tax Regulations.

	Nature of additions and distributions	Date	Amount	Number of months effective	Adjusted average (Col. 3 X Col. 4) (12)
	1	2	3	4	5
1			$		$
2					
3					
4					
5					
6					
7					
8					
9.	Net addition or reduction		$		$

SCHEDULES E and F

Schedules E and F ommitted as immaterial

QUESTIONS

1. Explain the nature of the corporation's business if not adequately described on first page:
   (a) Main business .....
   (b) Collateral businesses, if any .....
2. Date of incorporation .....
3. Under the laws of what State or country? .....
4. Enter on the following lines the names and addresses of three representative concerns in your locality engaged in the same kind of business .....

.....

5. What was the fair value of the total capital stock of the corporation as determined in the last assessment of the capital stock tax (if any)? Specify the year .....

6. If any patent is included among your assets, attach a schedule to this return showing for each patent its serial number, date of issue, name of patentee, amount of cash or stock paid therefor, and its present book value .....

7. If the corporation ever took over a going business or otherwise acquired a mixed aggregate of tangible property, patents, and copyrights, and good will and other similar intangible property, and paid for such property in whole or in part with stock or other securities, submit a statement showing—

   (a) The name of the concern taken over (or from which the property was acquired).

   (b) The nature of the assets and liabilities so acquired.

   (c) The total par value of the stock issued therefor.

   (d) The value at which each class of assets was carried on the books of the concern from which acquired. (If obtainable submit a balance sheet of the predecessor corporation as at the date of acquisition.)

(e) The value at which each item was entered on the books of the corporation making this return. The different classes of property must be valued as prescribed by Article 59 of the Excess Profits Tax Regulations and the values so obtained must be used in making adjustments 1, 2 and 3, Schedule C.

If patents or copyrights were acquired, state the basis on which their value was determined, and how they were paid for.

If good will or other intangible assets were acquired, state the basis on which their value was determined, and how they were paid for.

8. Is the corporation affiliated with one or more other corporations within the meaning of Article 77 of the Excess Profits Tax Regulations? ..... If so, submit a statement describing all its intercorporate relationships.

.....

.....

.....

9. Is this return a consolidated return within the meaning of Article 78 of the Excess Profits Tax Regulations? ..... If so, submit a schedule showing in detail the computation of the consolidated invested capital and income.

10. If the corporation was not in existence during the whole of any one of the calendar years 1911-1913, is its business substantially a continuation of a business carried on during any one or more of those years? ..... If so, give name under which, and address at which, its business was then carried on.....

.....

11. Submit a copy, in detail, of—

    (a) The balance sheet of the corporation at the beginning of the taxable year.

    (b) The balance sheet of the corporation at the close of the taxable year.

We, the undersigned, president and treasurer of the above-named company, being severally duly sworn, each for himself deposes and says that the foregoing return, including the accompanying schedules and statements (if any), has been examined by him and is to the best of his knowledge and belief a true and complete return made in good faith pursuant to the Excess Profits Tax Regulations.

Sworn to and subscribed before me) this ..... day of ....., 19.....

Seal of officer taking affidavit. : ....

: ..... President

: (Official capacity) .....

Treasurer"

EXHIBIT "F"

"CLAIM FOR REFUND

Taxes Erroneously or Illegally Collected.

Also Amounts Paid for Stamps Used in Error or Excess.

IMPORTANT
This claim should be forwarded to the Collector of Internal Revenue to whom the Tax was paid and must be accompanied by Collector's Receipt therefor

Date of filing to be plainly stamped here

STATE OF California)
) ss
COUNTY OF Los Angeles)

Write name so it can be easily read

Trumble Refining Company of Arizona
(Name of Claimant)
Higgins Building, Los Angeles, California.
Address of claimant; give street and number as well as city or town, and State.)

This deponent being duly sworn according to law deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to the claim are true and complete:

1. Business engaged in by claimant: Leasing use of refining process.

2. Character of assessment of tax: Income and Profits Tax—1917

   (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps . . . $11,870.68

4. Amount now asked to be refunded (or such greater amount as is legally refundable) 9,749.80

5. Date of payment of assessment or purchase of stamps: June 15, 1918

Deponent verily believes that the amount stated in Item 4 should be refunded and claimant now asks and demands refund of said amount for the following reasons:

We hereby claim refund of tax paid for the reasons set forth in letter attached hereto.

RECEIVED
APR 21, 1930
Section G
AUDIT REVIEW SEC

And this deponent further alleges that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented, except as stated herein, for the refunding of the whole or any part of the amount stated in Item 3.

Signed:

Write name so it can be easily read

TRUMBLE REFINING CO., OF ARIZ.
Per A. J. GUTZLER
Sec'y.

Sworn to and subscribed before me this 2nd day of July, 1920.

(SEAL) LOUIS W. GRATZ
(Name) Title)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue without charge.)

CERTIFICATES

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of Taxpayer	Character of assessment and period covered	List	Year	Month	Page	Line	Amount	Date paid	District in which paid
Trumble Refining Co. of Arizona.	Income		1918	May	198	13	$11,870.68	6/14/1918	6th Cal.

7
8
1 (SEAL)
8
0

JOHN P. CARTER
Collector of Internal Revenue

Assessment Clerk, Commissioner's Office

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state: Serial number	If special tax stamp, state: Period commencing
						5	
						2	
						3	
						1	
						4	

Collector.....District.....

Form 46

Schedule Number ..... District 6th California.

Allowed or Rejected Number ..... Corp.—1917
(Nature of tax)

Claimant: Trumble Refining Co. of Arizona.

Address: Los Angeles

Examined and submitted for action October 14, 1921

AR LBP 10/31/21

RECEIVED
AUG 9, 1920
CLAIMS DIVISION

Claim examined by— G. B.	Amount claimed:	$9,749.80
Claim approved by A. H. F. Chief of Division	Amount allowed:	$ .....
	Amount rejected:	$9,749.80

Committee on claims
WM. R. CAMPBELL
J. C. ROGERS
F. O. D.

H. A. H.

No returns"

EXHIBIT G

"IT:SA:NR:A
GB–48751098
"Trumble Refining Company of Arizona,
Higgins Building,
Los Angeles, California.

Sirs:

"Your claims for the refund of $9,749.80, part of income and excess profits tax for the year 1917, and for the abatement of $6,365.00 additional income and excess profits tax for the year 1917, as outlined in office letter dated February 21, 1920, have been examined.

"The claims are based upon an amended return filed for the year 1917. There is deducted thereon $54,121.42 as amortization of the value of certain contracts set up on the books of the corporation as an asset.

"Examination discloses that the contracts have no value for income tax purposes. The arbitrary valuation set up by the corporation was for the purpose of offsetting an issue of capital stock for which no cash payment was made.

"The audit for the year 1917 made in this office as set forth in letter dated February 21, 1920, was correct and the additional assessment legally made.

"The claims are, therefore, rejected.

Respectfully,

Commissioner

	Claim No. 77826 Abatement	Claim No. 78180 Refund
Claimed	$6,365.00	$9,749.80
Rejected	$6,365.00	$9,749.80

mlb"

EXHIBIT H

"CLAIM FOR ABATEMENT

Taxes Erroneously or Illegally Assessed

IMPORTANT	Date of filing to be
This claim should be forwarded to the Collector of Internal Revenue from whom notice of assessment was received.	RECEIVED JAN 23, 1922 U. S. INT. REV. 6th CAL plainly stamped here

State of California)
) ss
County of Los Angeles)

Write name so it can be easily read.	Trumble Refining Company (Name of claimant) Higgins Building, Los Angeles, California. (Address of claimant; give street and number as well as city or town, and state.)

May 1920. P. 30. L.4.
May 1920 30/4

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the

claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant: Leasing use of refining process.
2. Character of assessment or tax: Additional income and excess profits taxes for 1917 and interest.
3. Amount of assessment $6,365.00
4. Amount now asked to be abated $6,365.00

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

The additional tax of $6,365.00 arose from an office audit of the returns of this corporation. An examination of the books of this company in connection with the determination of our tax liability for the years 1917 to 1920, inclusive, was completed by Internal Revenue Agent C. F. Degele on September 26, 1921. A statement of facts has been prepared for consideration by the Field Audit Division in connection with the audit of the revenue agent's report, which statement shows that this company is entitle to a refund, and accompanies the claim herewith.

Under the above conditions it is respectfully requested that the additional tax and interest arising from the office audit (now superceded) be abated.

: Abatement card :	: RECEIVED :
: made 2/4/22 :	: APR 21, 1930 :
	: Section G :
	: Audit Review Division :

Signed:

: Write name :
: so it can :
: be easily :
: read. :

TRUMBLE REFINING COMPANY
F. M. TOWNSEND,
President.

Sworn to and subscribed before
me this 21st day of January, 1922.
(SEAL)

PEARL TRALLE
Notary Public
in and for the County of
Los Angeles, State of
California.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue without charge.)

CERTIFICATE OF ASSESSMENT

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name and Address	Character of assessment or article taxed.	Period covered by assessment	List	Year	Month	Page	Line	Amount
Trumble Refining Company, Higgins Bldg., Los Angeles, Cal.	Income	1917 Add'l Tax.		"20-	May	30	4	
			Outstanding—$6,365.00					

(SEAL)

JOHN P. CARTER
Collector of Internal Revenue

.....
Assessment Clerk, Commissioner's Office

Form 47.

Abatement Order No. ..... District 6th Calif.
Corp. 1917
(Nature of tax)

Claimant Trumble Refining Co.

Address Los Angeles,

Examined and submitted for action ..... 19.....

: Claim examined by— :		
: _____ :	Amount claimed:	$6,365.00
: Claim approved by :	Amount allowed:	$
: _____ :	Amount rejected:	$
: Chief of :	Committee on Claims:	
: Division :	.....	
_____	.....	

Adjusted under certificate
of overassessment #308813

SA:SM Section

SAMUEL J. MELICK
JAN 25, 1923"

EXHIBIT "I"

"TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue January 19, 1923

Address reply to
Commissioner of Internal Revenue
and refer to
IT:SA:SM
HSD–846

"Trumble Refining Company,
Higgins Building,
Los Angeles, California.

Sirs:

"The Revenue Act of 1921 provides that assessment of additional income and profits taxes for the taxable year 1917 must be made within five years after the date when such return was filed.

"The Commissioner of Internal Revenue is reluctant to proceed to impose assessments based upon a superficial determination of the true tax liability and in his judgment, both for the interests of the Government and the taxpayer, assessments should be made only after a thorough audit and careful consideration of all the facts in the case.

"However, in view of the limitation of time to permit the completion of this program it is requested that you execute and return to this office the enclosed form of waiver.

Respectfully,

E. W. CHATTERTON,
Deputy Commissioner

By S. ALEXANDER
Head of Division.

Enclosure:
Waiver.

EXHIBIT "J"

"IT:SA:SM
HSD–846

January 31, 1923
(Date)

RECEIVED
FEB 8, 1923
SPECIAL ASSESS-
MENT SECTION

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Trumble Refining Company of Los Angeles, Calif. and the Commissioner of Internal Revenue hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said corporation for the years 1917 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, irrespective of any period of limitations.

TRUMBLE REFINING COMPANY
By F. M. TOWNSEND,
President
Taxpayer

By .....
(SEAL) D. H. BLAIR
A
Commissioner

"If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

EXHIBIT "K"

"February 5, 1923

"IT:SA:SM
HSD–846
"Trumble Refining Company of Arizona,
Higgins Building,
Los Angeles, California.

Sirs:

"Reference is made to your income and excess profits tax returns for the calendar year 1917.

"You are advised that your tax has been redetermined under the provisions of Section 210 of the Revenue Act of October 3, 1917.

"The result of an audit under the above provisions of the law is summarized as follows:

Net income	$88,727.83
Total tax assessable	$18,084.51
Overassessment indicated	$ 151.17

"The total tax assessable is based upon the experience of a group of concerns, which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

"The overassessment indicated will be made the subject of a certificate of overassessment, which will be scheduled and presented through the office of the Collector of Internal Revenue for your district as promptly as possible.

Respectfully,

R. W. CHATTERTON,
Deputy Commissioner.
By (signed) F. B. BELL
Chief of Section

EXHIBIT L

: RECEIVED :
: FEB. 24, 1923 :
: Collector of :
: Int. Rev. :
: 6th District :
: of California :

IMMEDIATE

This schedule must be executed and all required steps taken without delay.
Commissioner of Internal Revenue.

"SCHEDULE OF REDUCTIONS OF TAX LIABILITY and ALLOWANCE OF ABATEMENTS AND CREDITS
INCOME TAX UNIT

15576.52

C-3621 ORIGINAL
Voucher to General Accounting Office

4677

Schedule No. IT-A
Sheet 1 of 2 sheets

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The returns of the taxpayers listed herein, together with their claims (if any) and appropriate supporting evidence, have been carefully examined and the tax liability of the respective taxpayers has been determined in accordance with the available facts and the law. The reductions in tax liability appearing in column 4 are accordingly recommended for allowance.

Date: February 17, 1923.

E. M. CHATTERTON,
Deputy Commissioner.

AUTHORIZATION OF COMMISSIONER

To the Collector, 6 California District:

The several amounts herein noted as reduction of tax liability are hereby approved and allowed.

You will immediately check the items herein against the accounts of the several taxpayers and determine whether the several amounts in which the tax liability has been reduced should be abated in whole or in part and make such abatement as may be warranted by the condition of the taxpayer's account for the year involved.

If any part of the tax is found to be an overpayment, you will examine all accounts of the taxpayer for subsequent periods and apply such overpayment as a credit against the tax owing (if any) on the taxpayer's account for subsequent periods. (This applies to income, war profits, and excess profits taxes only.)

The balance (if any) of the overpayment shall be entered in column 12 and placed upon a schedule of refunds (Form 7777A) and an appropriate memorandum made upon the taxpayer's account.

You will thereupon complete and certify this schedule and Schedule 7777A and return three copies of each to the Commissioner of Internal Revenue at Washington, making the appropriate entries in your accounts.

Date: February 17, 1923.

D. H. BLAIR,
Commissioner of Internal Revenue.

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items in this schedule have been checked against the accounts of the respective taxpayers concerned and the amounts indicated have been applied as abatements and credits on their accounts.

The amounts of overpayment and the net amounts refundable have been determined to be as indicated herein.

Date: April 23, 1923.

JOHN T. RILEY
Deputy Collector in Charge
6th Calif. District.

Accounts Unit
Noted and Entered

: Initials Date :
: C. O. C. 5/28/23 :

15,576.52 (Entries to be made by the Collector)

Item No. (1)	Certificate of over-assessment or claim number (2)	Name and Address of taxpayer (3)	Reduction of tax liability (Amount) (4)	List, page and line or account number (5)	Year (6)	Abatement (Amount (7)	Overpayment (Amount) (8)	Credit (Amount) (9)	Account to be credited; list, page, and line. (10)	Abated in excess (11)	Net amount refundable carried to Form 7777A (12)	Remarks (13)
X	X X	Totals of 55 items in this Schedule		X X X	X	15,454.74		121.78	X X X			X X
53	308813	Trumble Refining Co. of Arizona	151.17	5/18/198/13 5/20/30/4	17	151.17						

May—1920. P30. L4

EXHIBIT M

"February 23, 1923.

"Commissioner of Internal Revenue,
Washington, D. C.

Re IT:SA:SM-HSD-846

Sir:

"Reference is made to your letter dated February 5, 1923, file reference as above.

"It is noted that the tax liability of this corporation for the year 1917, has been redetermined under the provisions of October 3, 1917.

"On February 1, 1922, this corporation filed with the Commissioner of Internal Revenue a brief presenting objections to additional taxes recommended by a revenue agent, for the years 1917 to 1920, and stating the facts on which the determination of the tax liability would be based.

"On December 29, 1922, an income and profits tax waiver for the year 1917 was forwarded in response to the request made by the Income Tax Unit to our representative, E. P. Adams, on December 9, 1922, at an informal conference. At this conference, a request was made by Mr. Adams that a determination of the case be made only after a consideration of all years involved in the agent's report, and that an opportunity be given this corporation to submit additional arguments at a hearing in Washington.

"Under the conditions as stated above, it is respectfully requested that further action be withheld in the matter of the entering of the over-assessment for the year 1917, referred to in the letter dated February 5, 1923.

Respectfully,

TRUMBLE REFINING CO.

FMT
W"

By F. M. T.
President

EXHIBIT N

"WESTERN UNION

PAID—CHARGE Haskins & Sells,
Los Angeles, Calif.
May 15, 1923.

"Commissioner of Internal Revenue,
Washington, D. C.

"Referring our letter February twenty-third file IT COLON SA COLON SM DASH HSD DASH EIGHT FOUR SIX Stop Local Collector demands payment nineteen seventeen additional taxes six thousand two hundred thirteen eighty three and states it will be necessary to have wire authority from you to withhold collection pending hearing requested our letter. In view of understanding at informal conference December ninth and fact that questions involved in nineteen seventeen affect all years, please instruct collector withhold collection pending conference and advise us date set for such conference at which all years may be considered Stop We have filed bond with collector in amount one hundred fifty per cent of tax.

TRUMBLE REFINING COMPANY
OF ARIZONA"

EXHIBIT O

"TREASURY DEPARTMENT TELEGRAM

Where written: Washington

IT:SA:SM
HSD-846

May 21, 1923

"An answer 15. c/o I. B. – WU
Trumble Refining Co. of Arizona,
Los Angeles, California.

"Reply telegram fifteenth. No authority to instruct Collector Accept abatement claim to replace claim rejected Conference may be arranged on nineteen seventeen case if formal protest is filed but is impracticable on later years until information submitted is considered and audit completed.

E. W. CHATTERTON
Deputy Commissioner

: Treasury Department :
: DISPATCHED :
: MAY 21, 1923 :
: Internal Revenue :

EXHIBIT P

"(Execute Separate Form for Each Tax Period

CLAIM FOR

( ) Abatement of Tax Assessed.

( ) Credit Against Outstanding Assessments

(X) Refund of Taxes Illegally Collected

( ) Refund of Amounts Paid for Stamps used in error or excess

IMPORTANT File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.	NOTICE TO COLLECTOR. Collector must indicate in block above the kind of claim, except in Income Tax cases. Date received by Administrative Unit RECEIVED MAY 7, 1929 CLAIMS CONTROL SECTION. Stamp here	Collector's Notation District: 6 Cal. Account Number: May 1918 List P 198 L. 13. Date received: May P 30. L 4, 1920 List. RECEIVED APR 25, 1929 INTERNAL REVENUE 6th Cal. Stamp here Collector of Internal Revenue.

2908

State of California)
) ss
County of Los Angeles)

2
0 ———
9 : Type : Trumble Refining Company of Arizona
7 : or : (Name of taxpayer or purchaser of
4 : Print : stamps)
7 ——— 756 Subway Terminal Building
1 (Residence—give street and number as well as city or town and state.
Los Angeles, California.
(Business address)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Licensing patents	: Period	Year :	
	: From: January 1, 1917	:	
	: To: December 31, 1917	:	
2. Character of assessment or tax: Income Tax (State for or upon what the tax was assessed or the stamps affixed.			
3. Amount of assessment or stamps purchased . . .	$18,084.51	~~$17,764.08~~	

4. Reduction of Tax Liability requested (Income and Profits Tax) . . . . . .
5. Amount to be abated . . . . . .
6. Amount to be refunded (or such greater amount as is legally refundable) 17,764.08
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) ~~Mar 15, June 15, Sept. 15 & Dec. 15, 1918.~~ Paid 6/14/18; 2/17/23—5/22/23.
   (If statement covers income tax liability, items 8-11, inclusive, must be answered)
8. District in which return (if any) was filed: Los Angeles, California.
9. District in which unpaid assessment appears:
10. Amount of overpayment claimed as credit . . . . . $
11. Unpaid assessment against which credit is asked; period from ..... to ..... $

Deponent verily believes that this application should be allowed for the following reasons:

Refund due in accordance with decision of U. S. Board of Tax Appeals, Docket Nos. 11763, 17492, 26434 and 32151, allowing amortization of patent rights and royalty contracts of $72,511.90 annually. This claim filed in accordance with provisions of Section 252 of Revenue Act of 1921 and Section 248 C of 1926 Act, and rulings cov-

ering by IT: 1717 CB December 1923, Page 247; IT: 1870 and IT: 1871 CB. December 1923, pages 248 and 249, also IT: 2066 C.B. December 1926, Page 318.

See statement attached for computation.

: RECEIVED	:	Add. tax
: APR 21, 1930	:	Assm't 5/1920
: SECTION G	:	Last tax pd.
: AUDIT REVIEW DIVISION	:	5/22/23

Signed:

TRUMBLE REFINING COMPANY
OF ARIZONA

By A. J. GUTZLER,

Secretary

Sworn to and subscribed before me this 24th day of April, 1929.

(SEAL)

CORNELIUS M. ENNS
Notary Public
In and for the County of Los Angeles, State of California.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

CERTIFICATES Omitted as immaterial.

Schedule Number ..... District .....

Allowed or Rejected Number ....

(Nature of Tax)

: REJECTED :
: 17245 :
: I T SCHEDULE :

17245

Claimant .....

Address .....

Examined and submitted for action ..... 19.....

Amount claimed $.....

Amount allowed $..... Committee on Claims

Amount rejected $17,764.08 .....

.....

: RECEIVED :
: APR 25, 1929 :
: COL. OF INT. REV. :
: 6th Dist. Cal. :

YEAR ENDED DECEMBER 31, 1917

Net income as adjusted by Commissioner	$88,727.83
Depreciation of license agreements as fixed by Board's decision	72,511.90
Net taxable income	$16,215.93

Excess profits tax $16,215.93, less $3,000.00 exemption $13,215.93 @ 8%, Section 209 of the 1917 Act.		1,057.27
		$15,158.66
Taxable at 20%	$ 303.17	
Taxable at 40%	606.35	
Excess profits tax	1,057.27	
Adjusted Income Tax		$ 1,966.79
Tax paid as per original return	11,870.68	
Additional tax assessed May, 1920	6,365.00	
Less over-assessment letter #308813, February 24, 1923	151.17	
Tax paid		18,084.51
Refund due Petitioner		$16,117.72
Interest paid on additional Assessment of $6,213.83 paid May 22, 1923		1,646.36
TOTAL REFUND DUE TAXPAYER		$17,764.08"

EXHIBIT Q

"May 22, 1930

"IT:AR:G–4
T G C

"Trumble Refining Company of Arizona,
756 Subway Terminal Building,
Los Angeles, California.

Sirs:

"The following claims for refund of income and profits taxes have been examined and will be rejected for reasons stated below:

Year	Amount
1913	$ 304.38
1914	348.54
1915	725.11
1916	1,450.24
1917	17,764.08
1919	760.51
1920	1,463.35
1922	2,298.81
1923	2,298.81

"All of the above claims are based upon the contention that you are entitled to an annual deduction from income of $72,711.90 for depreciation of license agreements in view of the decision rendered in your case for the years 1918, 1920, 1921, 1922 and 1923 by the United States Board of Tax Appeals, Docket Numbers 11763, 17492, 26434 and 32151, 14 Board of Tax Appeals, 348, where-

in you were allowed a March 1, 1913 value of $850,000.00 on certain license agreements for depreciation purposes resulting in an annual deduction of $72,511.90 based upon an average life of eleven years, eight months and twenty days as at March 1, 1913.

"Since the Commissioner has not acquiesced in the decision referred to above, your contention cannot be allowed for those years which were not pending before the Board, namely, 1913, 1914, 1915, 1916, 1917 and 1919.

"The claims for the years 1913, 1914, 1915, 1916 and 1919, which you contend were filed in accordance with the provisions of Sections 252 and 284(c) of the Revenue Acts of 1921 and 1926, respectively, are barred by the statute of limitations. The deduction for depreciation of license agreements, if allowable for those years, represents a recovery through income of realized appreciation and as such does not result in any reduction of your invested capital for the years 1917 to 1921, inclusive. Furthermore, your invested capital has not been reduced due to the failure to take such deductions in the prior years. The provisions of Section 252 relating to a decrease in the invested capital for failure to take adequate deductions in previous years, and Section 284(c) which relates to the same matter are, therefore, not applicable. Since no tax was

: REJECTED :
: 17245 :
: SCHEDULE :

paid for any of the years 1913, 1914, 1915, 1916 and 1919 within four years of the filing of the claim, the statute of limitations has run and no refund can be made for those years.

"For the years 1920, 1922 and 1923 the deduction for depreciation of license agreements in the amount of $72,711.90 has been allowed in the adjudication of your tax liability for each of those years in accordance with the decision of the Board. The contentions set forth in your claim for these years having been allowed, no further adjustments are necessary.

"If you do not acquiesce in the proposed action relative to your claims for the years 1913, 1914, 1915, 1916, 1917 and 1919, and desire a hearing in the Unit at Washington, D. C., such hearing will be granted if written request is made therefor within thirty days from the date of this letter.

"If a hearing is not requested, the rejection of all of your claims will be officially scheduled at the expiration of the period indicated.

Respectfully,

DAVID BURNET,
Deputy Commissioner,

By (signed) H. B. ROBINSON,
Head of Division

MEC-1"

EXHIBIT R

"TREASURY DEPARTMENT
Washington
Office of July 25, 1930
Commissioner of Internal Revenue
IT:C:CC-

RECEIVED	
AUG 1, 1930	
F.M.T.	E.H.A.
A.J.G.	S.T.
M.J.T.	W.K.W.
Wm. McG.	

"Trumble Refining Company of Arizona,
756 Subway Terminal Building,
Los Angeles, California.

In re: Refund Claims for Years 1913 to 1917, incl., 1919, 1920, 1922, 1923.

Amounts: $304.38, $348.54, $725.11, $1,450.24, $17,764.08 $760.51, $1,463.35, $2,298.81, $2,298.81.

Sirs:

"Your claims for refund of taxes, above referred to, were disallowed by the Commissioner on a schedule dated July 25, 1930.

Respectfully,

DAVID BURNET,
Deputy Commissioner.

By T. F. LANGLEY
Head of Division"

And the following written Stipulation was introduced as Plaintiff's Exhibit 2:

PLAINTIFFS' EXHIBIT 2

"(Title of Court and Cause)

"STIPULATION

"It is hereby stipulated and agreed by and between the parties hereto that the invested capital of the Trumble Refining Company for the year 1917 as computed under the provisions of Section 207 of the Revenue Act of 1917 is the sum of $67,760.17.

"It is further stipulated that taxes paid by the Trumble Refining Company for the year 1917 to the then Collectors of Internal Revenue have been paid into the Treasury of the United States.

"Dated February 2, 1937.

THOMAS R. DEMPSEY
Thomas R. Dempsey
A. CALDER MACKAY
A. Calder Mackay
Attorneys for Plaintiffs.

PEIRSON M. HALL
Peirson M. Hall
United States Attorney

.....

Asst. U. S. Attorney
EUGENE HARPOLE,
Eugene Harpole,
Special Attorney—Bureau of Internal Revenue.
Attorneys for Defendant."

E. P. ADAMS,

called as a witness on behalf of the plaintiffs, after being first duly sworn, testifies as follows:

DIRECT EXAMINATION

by Mr. Mackay:

I am a certified public accountant and have been practicing in Los Angeles for seventeen years. In 1910 I was connected with Haskins & Sells and doing accounting work but was not certified at that time. I was then acquainted with Trumble Refining Company and did the first work for them in 1921. I was admitted to practice before the Bureau of Internal Revenue and handling tax matters in 1921. I assisted in handling some tax matters for the Trumble Refining Company about that time involving the year 1917 and subsequent years up to 1926. In 1921 the Trumble Refining Company received a report of an investigation made in August of that year by Revenue Agent Charles F. Degele of the company's books and income tax returns for the years 1917 to 1920, inclusive.

As representative of the Trumble Refining Company I prepared a written protest to this Revenue Agent's report and filed it with the local Internal Revenue Agent—it was filed with the Commissioner of Internal Revenue. This is a copy of the protest I prepared to the Revenue Agent's report for the years 1917 to 1920, inclusive.

Whereupon, said copy was introduced in evidence as Plaintiffs' Exhibit 3:

PLAINTIFFS' EXHIBIT 3

"TRUMBLE REFINING COMPANY OF ARIZONA
916 HIGGINS BUILDING
LOS ANGELES, CALIFORNIA.

"Brief presenting objections of taxpayer to additional assessment of Federal income and profits taxes for the years 1917-1920, inclusive, as recommended in the report of *i*nternal Revenue Agent C. F. Degele, dated August 17, 1921.

Filed on 2/1/22

"TRUMBLE REFINING COMPANY OF ARIZONA
916 HIGGINS BUILDING
LOS ANGELES, CALIFORNIA

OUTLINE OF BRIEF

"In the report of Internal Revenue Agent C. F. Degele, dated August 17, 1921, which was delivered to us on September 26, 1921, the following additional assessments of Federal income and profits taxes are proposed:

1917	$ 40,289.98
1918	47,796.08
1919	28,046.05
1920	35,651.06
Total	$151,783.17

"We have carefully reviewed the adjustments made by the agent, and respectfully enter protest against the additional taxes arising from the following:

I Computation of the cost of patent rights and royalty contracts for the purposes of invested capital and depreciation in the years 1917-1920, inclusive.

II Disallowance of part of the salaries paid to officers in the years 1918-1920, inclusive.

"TRUMBLE REFINING COMPANY OF ARIZONA
916 HIGGINS BUILDING
LOS ANGELES, CALIFORNIA

STATEMENT OF FACTS AND CONCLUSIONS

"I COMPUTATION OF THE COST OF PATENT RIGHTS AND DISALLOWANCE OF THE VALUE OF PATENT RIGHTS AND ROYALTY CONTRACTS FOR THE PURPOSES OF INVESTED CAPITAL AND DEPRECIATION IN THE YEARS 1917-1920, INCLUSIVE.

Patent Rights and Contracts

"As stated by the revenue agent, the business of the Trumble Refining Company of Arizona consisted in the granting of licenses to oil companies for the use of patented processes and apparatus for the refining of crude oils. The patent rights held by the company were acquired as follows:

"As of July 13, 1910, Messrs. M. J. Trumble and F. M. Townsend assigned to the company applications for patents covering a process and apparatus known as the 'Trumble

Evaporator for Petroleum Oils and the Like', and the 'Trumble Oil Separator and Purifier', the consideration for which was fully paid capital stock of the company issued as follows:

	Total	Common Stock	Preferred Stock
Domestic rights	$1,470,360.00	$1,151,960.00	$318,400.00
Foreign rights	1,000,000.00	800,000.00	200,000.00
Total	$2,470,360.00	$1,951,960.00	$518,400.00

"The following patents were subsequently granted on these applications:

U.S. Patent Number	Date	Description
996,736	July 4, 1911	Evaporators for petroleum oils or other liquids.
1,002,474	Sept. 5, 1911	Apparatus for refining petroleums.

"On March 27, 1911, the corporation acquired from M. J. Trumble all rights to certain inventions known as a 'Process of Refining Petroleum' and an 'Apparatus for Refining Petroleum', the consideration for which was 50,000 shares of preferred stock and 320,000 shares of common stock, valued in the sales contract at $.40 and $.25 per share, respectively. On January 14, 1913, applications for patent covering these rights were filed, and on August 12, 1913, U. S. Patent #1,070,361 was issued therefor.

"Eighty foreign patents were issued as shown in Exhibit 'C'.

"Beginning in September, 1910, the company entered into contracts with various oil producers for the use of the process and apparatus during the life of the patents. These contracts provided for royalties based on the oil treated by the patented process and stipulated that the apparatus of the Trumble Refining Company of Arizona be used exclusively during the life of the patents.

"A contract, a copy of which is attached as Exhibit 'A', was made on April 14, 1911, with the Esperanza Consolidated Oil Company, now the General Petroleum Corporation. This company agreed to use the Trumble apparatus exclusively in its operations, which were more extensive than those of any other company in this territory. As a result of the successful operation of the plants of the Esperanza Consolidated Oil Company and the Petroleum Development Company (a subsidiary of the Atchison, Topeka, and Santa Fe Railway Company) the value of the patents became widely known, and the Trumble Refining Company was approached by other large oil companies, both foreign and domestic, with proposals for the exclusive rights to the use of the apparatus. Accordingly, at March 1, 1913, the Trumble Refining Company had consummated seventeen license agreements covering plants with an annual capacity in excess of 18,000,000 barrels, and, in addition, had negotiations pending for contracts with the following:

Royal Dutch Shell Company, rights in Borneo, Sumatra, Roumania and Russia—21,000,000 bbls.

Union Oil Company of California—10,000,000 bbls.

Independent Oil Producers Agency—18,250,000 bbls.

"On April 2, 1915, all patent rights in the United States and foreign countries were sold to the Royal Dutch Shell Company, with the exception of those rights appertaining to the contracts in effect at the date of sale.

"These contracts, with a single exception, had been held by the Trumble Refining Company at March 1, 1913. The revenue agent has held that, as a result of this sale, the company retained no value in the patents for income tax purposes.

"This conclusion we hold to be contrary to the law and the facts, and submit, therefore, the following for your further consideration.

Fair Market Value, March 1, 1913

"The Trumble Refining Company was the owner at March 1, 1913, of certain patent rights acquired for the following:

Preferred stock	$ 538.400.00
Common stock	2,032,110.00
Total	$2,570,510.00
Cash paid for attorneys' fees, etc. to February 28, 1913 .	27,786.71
Total cost of patents . .	$2,598,296.71

"These patent rights consisted of U. S. patents Nos. 996,736 and 1,002,474, and six pending United States applications, together with sixty-eight foreign rights for the process and apparatus covered by the United States patents and applications.

"The company was also the owner, through a contract dated April 12, 1911, of the rights to any future improvements and processes relating to the treatment of crude oils that might be perfected by M. J. Trumble.

"The revenue agent shows a total cost to March 1, 1913, as follows:

7/25/10	Preferred	stock,	220,000	shares at	25¢	$ 55,000.00
3/27/11	"	"	50,000	"	40¢	20,000.00
4/ 7/11	"	"	298,400	"	25¢	74,600.00
7/25/10	Common	stock,	900,000	"	15¢	135,000.00
3/ 2/11	"	"	1,000	"	15¢	150.00
3/27/11	"	"	320,000	"	25¢	80,000.00
4/ 7/11	"	"	1,051,960	"	15¢	157,794.00
7/25/10—2/28/13	Cash					27,786.71
	Total					$550,330.71

"In his computations, the revenue agent has ascribed cash values of $.25 and $.15, respectively, to the preferred and common stock issued at par to Messrs. Trumble and Townsend on July 25, 1910 and April 7, 1911. These cash values were based on sales of small blocks of stock and were no more indicative of the cash value of the stock issued to Messrs. Trumble and Townsend than was the sale to the Esperanza Consolidated Oil Company, authorized on April 7, 1911, of 200,000 shares of preferred and 800,000 shares of common stock at $.025 per share. The Esperanza Consolidated Oil Company had agreed to use the Trumble process exclusively, and to further in every possible manner the interests of the Trumble Refining Company. As the former company was one of the largest oil operators in this field, the value of the contract

to the Trumble Refining Company was far in excess of the par value of the capital stock transferred to the Esperanza Consolidated Oil Company, and had proper accounting of the transaction been made on the books, the Esperanza contract would have been entered at not less than the par value of the stock issued, or $1,000,000.00.

"As previously noted, cash values of $.40 and $.25, respectively, were placed on the 50,000 shares of preferred and 320,000 shares of common capital stock issued to Mr. Trumble as of March 27, 1911. These values were accepted by the agent, although he placed cash values of $.25 and $.15, respectively, on the 298,400 shares of preferred and the 1,051,960 shares of common stock transferred to Messrs. Trumble and Townsend on April 7, 1911. This stock was issued in full satisfaction of their claim for 1,550,000 shares of common and 390,000 shares of preferred stock under the contract of July 13, 1910, and the transfer was made after the authorization of the contract with the Esperanza Consolidated Oil Company which assured the Trumble Refining Company large royalties and which unquestionably increased the cash value of the stock to par.

"Under these conditions, it is submitted that the revenue agent is in error, and that he should have accepted the adjustment for discount made in 1915 at the time the interests of the preferred and common stockholders were harmonized.

"Under the income tax laws and regulations, the fair market value of the patents as of March 1, 1913, represented capital value returnable over their remaining life. The book value of the patents at that date was $2,598,-296.71, although this amount is not recognized by the company as the minimum value of these assets.

"The value of the two United States patents was in excess of the book value thereof, both foreign and domestic, as indicated by the following:

"The royalties to be received during the life of the patents, under existing contracts with domestic corporations, reduced to a present worth basis as of March 1, 1913, as shown in Exhibit 'B', amounted to $1,668,294.52. In addition, negotiations pending with the Union Oil Company of California and the Independent Oil Producers Agency indicated that the royalties to be secured under these proposed contracts would in each case equal the combined royalties of the then existing contracts. Thus, there was a reasonable expectation at March 1, 1913, based on contracts in force and under negotiation, of royalties having a present worth valuation as of that date of $5,004,883.56. This does not take into consideration the value to be ascribed to the patents by reason of the possibility of securing additional valuable contracts through the ownership thereof.

"As a result of negotiations begun in December, 1912, and pending at March 1, 1913, the company made on July 23, 1913, a formal offer to the Royal Dutch Shell Company of $2,500,000.00 for the sale of the rights to the Trumble process in Borneo, Sumatra, Roumania and Russia.

"The Royal Dutch Shell Company, in the negotiations mentioned in the foregoing, evinced a desire for the rights for all other foreign countries with the exception of Canada and Mexico. The Trumble Refining Company, however, because of other pending negotiations, did not at that time desire to sell these additional foreign rights, and offered in lieu thereof to license the use of the process and apparatus on a royalty basis.

"In view of the facts and conditions as hereinbefore outlined, it is respectfully submitted:

"1. That the value of $550,330.71 ascribed to these patents as cost by the internal revenue agent is entirely unreasonable as to the value at the time of acquirement.

"2. That the value of such patents as of March 1, 1913, on the basis of existing contracts and negotiations then pending, which must be taken into consideration in determining such value, was far in excess of the book value of such patents on that date; i. e., $2,598,296.71.

"3. That the minimum value as of March 1, 1913, that could be placed on such patents by a buyer with a full knowledge of the facts was:

Present worth of estimated royalties under existing contracts . .	$1,668,294.52
Value of patent rights, based on contracts under negotiation involving royalties of a present worth of $3,336,589.04 . . .	1,668,294.52
Total	$3,336,589.04

"4. That the minimum value that could be placed on such assets as of March 1, 1913, in the light of subsequent events was:

Present worth of royalties received, 1913-1920 and estimated royalties for remaining life of patents, based on 1920 . . .	$ 791,213.27
Patent rights sold April 2, 1915 .	1,000,000.00
Total	$1,791,213.27

"We contend that the value shown under paragraph #3, $3,336,589.04, correctly reflects the fair market value of the patent rights as of March 1, 1913, in accordance with the income tax laws and regulations, and that this value is returnable to the company through deductions for depreciation during the life of the patents.

Sale of part of Patent Rights, April 12, 1915

"As a result of the negotiations hereinbefore referred to, the foreign patent rights and part of the domestic patent rights were sold to the Royal Dutch Shell Company for $1,000,000.00 as of April 2, 1915. A copy of the sales contract is attached hereto as Exhibit 'C'. As will be noted from this contract, the Trumble Refining Company reserved from the sale all rights in connection with eighteen license contracts, seventeen of which had been held by the company as of March 1, 1913, and which, on the basis of present worth of anticipated royalties, had a fair market value of $1,668,294.52. These patent rights reserved were valued by the company at approximately $800,000.00, and, for the purpose of providing a satisfactory method of adjusting the interests of the preferred and common stockholders, it was agreed that the preferred stockholders should be paid the accumulated dividends accrued on their stock from April, 1911, to December 31, 1914, amounting to $238,780.35, and that the common stock should be reduced from 4,000,000 to 400,000 shares. Our accountants at that time (Price, Waterhouse & Company) advised that the proceeds of the sale be divided in such a manner as to show profits available for dividends, and that the necessary entries be placed upon the books. As $11,367.24 had been expended subsequent to December 31, 1912, for attorneys' fees, taxes, etc., on account of patent rights, it was suggested that

$250,000.00 of the proceeds of the sale be allocated to rights acquired since that date, thus showing a profit of sufficient amount to provide for dividends on the preferred stock. Entries were accordingly made on the books as follows:

Patent rights prior to December 31, 1912 . .	$1,785,920.25	
Patent rights subsequent to December 31, 1912	11,367.24	
Patent rights and royalty contracts	811,821.36	
Patents		$2,609,108.85

To close old patent account.

Cash	$1,000,000.00	
Patent rights prior to December 31, 1912		$ 750,000.00
Patent rights subsequent to December 31, 1912		250,000.00

Sale to Mr. W. Meischke-Smith

Common stock	$2,880,000.00	
Discount on common capital stock . .		$1,140,079.75
Patents prior to December 31, 1912 .		1,035,920.25
Cash		704,000.00

To reduce common stock authorized to 400,000 shares of the par value of $1.00 and the outstanding to 320,000 shares.

"As the result of these adjustments, the value of the reserved patent rights was placed at $811,821.36, as shown in the following:

Reduction of common stock		$2,880,000.00
Less:		
Cash	$ 704,000.00	
Stock discount . . .	1,140,079.75	
		1,844,079.75
Balance credited to patents		$1,035,920.25
Balance of patent account		$2,609,108.85
Credits:		
Expenditures subsequent to December 31, 1912	$ 11,367.24	
Sale	750,000.00	
Common stock . . .	1,035,920.25	
		1,797,287.49
Remainder		$ 811,821.36

"The result of the sale was that the Trumble Refining Company retained patent rights valued at $1,668,294.52 as of March 1, 1913, on the basis of royalties anticipated under existing contracts, and received $1,000,000.00 for the remaining domestic and foreign rights and for certain pending applications for patent. That the property sold in no way affected the value of the reserved rights is shown by reference to page 3, paragraph 1, of the president's report to the stockholders for the year 1915, a copy of which is attached as Exhibit 'D'.

"As further substantiation of the value of the reserved patent rights, we submit as Exhibits 'E' and 'F' statements from the Shell Company of California and the General Petroleum Corporation.

"In view of the foregoing facts, it is submitted that the revenue agent was in error in his conclusion that the Trumble Refining Company was not authorized under the income tax laws and the regulations in claiming depreciation of patent rights and royalty contracts in the years 1917 to 1920, inclusive, as Article 167, Regulations 45 states, in part:

" 'In computing a depreciation allowance in the case of a patent or copyright, the capital sum to be replaced is the cost (not already deducted as current expense) of the patent or copyright or its fair market value as of March 1, 1913, if acquired prior thereto. The allowance should be computed by an apportionment of the cost of the patent or copyright or of its fair market value as of March 1, 1913, over the life of the patent or copyright since its grant, or since its acquisition by the taxpayer, or since March 1, 1913, as the case may be. If the patent or copyright was acquired from the Government, its cost consists of the various Government fees, cost of drawings, experimental models, attorney's fees, etc., actually paid. If a corporation purchased a patent and paid for it in stock or securities, its cost is the fair market value of the stock or securities at the time of the purchase.'

and the principles as set forth in this article are applicable to the year 1917 under T. B. R. 59, Cumulative Bulletin #1, pages 138-139.

"Under this article, the Trumble Refining Company is allowed an annual depreciation deduction based on the fair market value of its patent rights held on March 1,

1913, and still owned, and the life of the patents subsequent to March 1, 1913. In determining the fair market value as of March 1, 1913, of the patent rights owned by the Trumble Refining Company for the taxable years 1917-1920 under review, reference must be made under the income tax laws and the regulations to the following:

1. Cost prior to March 1, 1913.
2. Increase in value to March 1, 1913.

"The cost of all rights in the patents owned as shown by the books as of March 1, 1913, was $2,598,296.71 (erroneously computed by the revenue agent as $550,330.71), less the discount adjustment made in April, 1915, of $1,035,920.25, or $1,562,376.46. This amount represented the value of the patents as yet undeveloped in 1910 and 1911, plus attorneys' fees and taxes paid in securing foreign rights for the original patents. At March 1, 1913, the utility value of the patents had become generally known in the United States and in foreign countries, and, by reason thereof, it must be recognized that the value at the date of acquirement cannot be reasonably taken as indicative of the fair market value on March 1, 1913.

"In establishing the increase in value of intangible assets as of a basic date, the income tax regulations prescribe, among other things, reference to earning capacity and to sales of similar property.

"The earning capacity of the patents as of March 1, 1913, as computed by a purchaser would be based on the agreements then in effect and on information relative to future contracts to be secured.

"The fair value of the patent rights at March 1, 1913, on the basis of the present worth as of that date of the

royalties from the seventeen contracts then in force, was $1,668,294.52. In addition, contracts then under negotiation with the Union Oil Company of California and the Independent Oil Producers Agency indicated a reasonable expectation of royalties to be received therefrom of a present worth value of $3,336,589.04. Consequently, the value of $3,336,589.04 placed on the patent rights as of March 1, 1913, is, in the light of known facts, a conservative one.

"In the absence of actual sales, a prospective purchaser would necessarily base his valuation upon information in regard to negotiations for sale of this or similar property.

"In December, 1912, the Royal Dutch Shell Company began negotiations for the purchase of all rights in foreign countries with the exception of Mexico and Canada, and the company anticipated that a sale of the foreign rights would be consummated for an amount greatly in excess of the book value of all patents held at that date, and an investigation of these negotiations by a purchaser would have indicated that such a value was most conservative. On July 23, 1913, the assignment of the rights in four countries, Borneo, Sumatra, Roumanian and Russia, was offered the Royal Dutch Shell Company for $2,500,000.00, as shown in Exhibit 'G'.

"All of the facts as set forth above clearly indicate a fair market value (as determined between a willing seller and buyer, each having knowledge of the facts), far in excess of the value of $2,598,296.71 shown by the books of the company as of March 1, 1913.

"It is, therefore, submitted that the position taken by the company in its books of accounts and tax returns was extremely conservative, and that the exception taken thereto by the revenue agent was unwarranted, first, in that

the invested capital shown by this company resulting from the issue of stock for patent rights is correctly stated, and, secondly, in that the depreciation of patent rights and contracts is based on a minimum fair market value as of March 1, 1913, and is correctly stated under A. R. M. 35, C. B. 2, page 142.

"II DISALLOWANCE OF PART OF THE SALARIES PAID TO OFFICERS IN THE YEARS 1918-1920, INCLUSIVE.

"The revenue agent has disallowed officers' salaries as follows:

1918	$5,250.00
1919	9,000.00
1920	9,000.00

"These salaries, it appears from the agent's report, were disallowed on the following grounds:

Salaries paid in previous years
Minutes of meeting of Board of Directors, July 31, 1916
Outside interests of officers.

"In connection therewith, please note:

"The stock of the Trumble Refining Company subsequent to April, 1911 had been held approximately as follows:

F. M. Townsend	10%
M. J. Trumble	23%
A. J. Gutzler	10%
General Petroleum Company . . .	50%
John Barneson	3%
Various	4%

"The salaries paid to officers of the company in prior years had not been commensurate in any sense with the services rendered, nor had the officers considered their remuneration in the light of payment for their services. Under the agreement with the Esperanza Consolidated Oil Company (now the General Petroleum Corporation), dated April 12, 1911, that company had acquired one-half of the stock of the company and under the agreement had covenanted to use the Trumble process and apparatus exclusively, and to do everything in its power to further the interest of the Trumble Refining Company. As a result of this agreement, Capt. John Barneson, both as president of the former company and as its representative on the Board of Directors of the Trumble Refining Company and as an individual stockholder of the latter company, had devoted a great deal of his time to the affairs of the Trumble Refining Company and had placed at the disposal of the latter company the services of his staff. Under these conditions, the officers of the Trumble Refining Company considered it entirely unwarrantable to insist on salaries commensurate with the services rendered. With these conditions in mind, and in view of the policy adopted in August, 1915, of paying quarterly dividends, the three officers voluntarily proposed to the General Petroleum Corporation that the salaries be further reduced in 1916, and that Captain Barneson be included on an executive committee and that he receive the same remuneration as the officers. Accordingly, as of July 31, 1916, the proposed change was approved, and a remuneration of $50.00 per month for each member was adopted.

In June, 1918, the General Petroleum Corporation, through its president, Capt. John Barneson, advised the executive committee that it desired a more equitable arrangement in regard to the services rendered the Trumble

Refining Company by its staff. It was stated that the contemplated improvements in the plants then operating and the construction of the new plant at Lebec under the Mojave license would require more of the time of the staff of the General Petroleum Corporation than was thought proper without compensation, and that in making salary adjustments for the ensuing year, the General Petroleum Corporation considered it only fair that allowance should be made for compensation for services rendered by its staff. The executive committee of the Trumble Refining Company decided that the position of the General Petroleum Corporation was well taken and that salaries should be paid to Capt. John Barneson and L. T. Barneson commensurate with the services rendered. It was further agreed that, while the basis adopted in 1916 was at that time equitable to the majority stockholders, such a basis under the Federal income tax laws was inequitable to the company and that, although the company had been penalized thereby in the year 1917, it was the intent of the tax laws that a reasonable compensation should be paid officers of the company for their services. It was decided, therefore, that $250.00 per month was the minimum value for the services then being rendered, and the change in compensation was authorized as of June 24, 1918. At the same time the executive committee was increased to five members in order to include L. T. Barneson, who, as the operating official of the General Petroleum Corporation, had been devoting a considerable amount of time to the supervision of improvements to plants and to the operation thereof under license agreements.

"The following shows the nature of the services rendered by each member of the committee subsequent to 1916:

"F. M. Townsend—President
Member of executive committee.

"Mr. Townsend collaborated with M. J. Trumble in connection with the improvements in process and the apparatus covered by patents under which licenses were granted. Mr. Townsend is a recognized patent solicitor and his knowledge of the procedure of the United States Patent Office and of the general patent laws was constantly used by Mr. Trumble in connection with his work of inspecting the operation of the plants under the license agreements and in passing upon the changes proposed in such plants. Mr. Townsend had also been called upon in connection with patent infringement actions pending since 1913, (hearings having been discontinued during the war) for much research work and for attendance in court in 1920 necessitated by an action still pending. He devoted considerable time with M. J. Trumble in outlining experiments and preparing data to combat evidence advanced by defendants in this case.

"A. J. Gutzler—Secretary and member of executive committee.

"Mr. Gutzler devotes practically all of his time to his duties as Secretary of the corporation. He has supervision of accounts and correspondence and reviews the daily reports on operations of plants under license. In addition, he has charge of collections and financing.

"L. T. Barneson—Member of executive committee from June 28, 1918.

"Mr. Barneson, as general manager of the General Petroleum Corporation had, prior to 1918, devoted considerable time to supervision of the plants of the Trumble Refining Company under license by the General Petroleum Corporation, and, under the conditions previously referred to, had received no remuneration from the Trumble Refining Company. In addition to these services, Mr. Barneson, in conjunction with Mr. Trumble during the last half of 1918, designed an improved type of plant for erection under the Mojave License agreement (#17 referred to in Exhibit 'B'), and during the construction of this plant from April, 1919, to June, 1920, at a cost of $167,755.26, made inspections of the work with Mr. Trumble and supervised all improvements and changes. Since this plant was placed in operation in June, 1920, Mr. Barneson has inspected it monthly.

"Since 1912, Mr. Barneson has, in collaboration with Mr. Trumble made a study of the various processes and apparatus for treating crude petroleum and has, by reason of his knowledge thereof, rendered valuable service to the Trumble Refining Company. He was enabled to do this to greater advantage after the change of policy in June, 1918, when compensation was authorized by the stockholders for services rendered by the officials of the General Petroleum Corporation.

"Capt. John Barneson—Vice-President and director from April, 1911. Member of executive committee from May, 1915.

"Captain Barneson, through his marked ability and his prestige as president of the General Petroleum Corporation, has had the direction of the financial affairs of the company.

"During the years 1918, 1919, 1920 and 1921, the future operations of the Trumble Refining Company as regards improvements of the existing patent rights and the extension of license agreements by such improvements have been given a great deal of attention by the executive committee, and Captain Barneson has been constantly called into consultation in connection therewith. As one result of these policies, the construction of the plant at Lebec under contract #17 was decided upon in 1918. The preparation of plans was completed in that year and construction was begun by the General Petroleum Corporation in 1919, and completed in June, 1920, at a cost of $167,755.26. Royalties from this plant amounted to $8,342.52 in 1919 and $31,819.44 in 1920. Improvements in the Vernon plant (contract #16) were authorized, and construction was begun in 1920 and completed in May, 1921, at cost of $239,540.08.

"As previously stated, the officers and staff of the General Petroleum Corporation, in all years prior to 1918, had given their services to the Trumble Refining Company without compensation, but in 1918 an arrangement was effected with the General Petroleum Corporation under which the Trumble Refining Company agreed to pay Captain John Barneson and L. T. Barneson a salary for the services rendered by them.

"M. J. Trumble—Director
Member of executive committee from May, 1915.

"Mr. Trumble, as the inventor of the process and apparatus owned by the Trumble Refining Company, had full charge of the erection and supervision of the plants operated under the contracts held by the company, and was responsible to the licensees for the efficient operation of such plants. In order that the interests of the Trumble Refining Company might be advanced through increased royalties by the improvement of the process and apparatus, experiments were conducted in the laboratory and at the plant at Vernon.

"The time devoted during the years in question was as follows:

Inspection of plants operated by licenses:

1918-1919—Vernon plant of General Petroleum Corporation, weekly.

1919-1920—Vernon plant, monthly.
Lebec plant in 1919, monthly.
Lebec plant in 1920, tri-monthly.

Laboratory and experimental work:

The work done by Mr. Trumble in his laboratory and at plants of the licensees cannot be accurately determined, as such work is carried on throughout the month, both during the day and at night. As a result of his work, many improvements were developed, of which the following were patented:

Process of treating petroleum, Patent #1,260,598, issued March 26, 1918.

Process and apparatus for treating hydrocarbon oils; Patent #1,349,794, issued August 23, 1920.

Process of and apparatus for treating hydrocarbon oils, Patent #1,304,125, issued May 20, 1919.

Process of and apparatus for refining oil; application filed March 1, 1920.

General

"The revenue agent in his report stresses the fact that minutes of the meetings of the Board of Directors show that the principal duty of the officers was to meet once a month and to declare dividends. In view of the fact that this is a close corporation, the adoption of policies and decisions on matters relating to the affairs of the company have always been carried out at informal meetings of the executive committee. These meetings have been held whenever any matter of importance was to be considered, and it is impossible to state the exact number of such informal meetings held in any month or year. The offices of the General Petroleum Corporation and the Trumble Refining Company are located in the same building and whenever matters requiring the attention of the full committee arise, Messrs. John and L. T. Barneson are called to meet with the other members of the committee in the offices of the Trumble Refining Company, and the necessary procedure is agreed upon at that time or else deferred to a subsequent meeting.

"Under these conditions, it is impossible to state with any degree of accuracy the amount of time devoted by the officers or the members of the executive committee. The character of specific services rendered and the general

duties in connection with the direction of the affairs, as previously referred to, are such as to make the element of time an unreasonable measure of value, and attention is respectfully directed to the fact that services of the character rendered could not have been secured through the engagement of outside attorneys and engineers for many times the remuneration paid by this company to its officers, and it is, therefore, respectfully urged that this company be not penalized through the disallowance as deductions of any part of the payments made to its officers.

"TRUMBLE REFINING COMPANY OF ARIZONA
916 HIGGINS BUILDING
LOS ANGELES, CALIFORNIA

LIST OF STATEMENTS ATTACHED

EXHIBIT

'A' — COPY OF CONTRACT WITH THE ESPERANZA CONSOLIDATED OIL COMPANY, DATED APRIL 14, 1911.

'B' — CONTRACTS HELD AS OF MARCH 1, 1913, AND PRESENT WORTH OF ROYALTIES AS OF THAT DATE.

'C' — COPY OF SALES CONTRACT WITH THE ROYAL DUTCH SHELL COMPANY DATED APRIL 2, 1915.

'D' — COPY OF EXTRACT FROM THE PRESIDENT'S REPORT FOR THE YEAR 1915.

'E' — STATEMENT OF THE SHELL COMPANY OF CALIFORNIA IN REGARD TO RESERVED PATENT RIGHTS.

'F' — STATEMENT OF THE GENERAL PETROLEUM CORPORATION IN REGARD TO RESERVED PATENT RIGHTS.

'G' — OFFER TO THE ROYAL DUTCH SHELL COMPANY OF RIGHTS IN BORNEO, SUMATRA, ROUMANIA, AND RUSSIA, DATED JULY 23, 1913.

'H' — COMPUTATION OF TAXES.

JURAT.

EXHIBIT 'A'

"THIS AGREEMENT, made and entered into this 12th day of April, A. D. 1911, by and between TRUMBLE REFINING COMPANY, a corporation incorporated, organized and existing under the laws of the Territory of Arizona (hereinafter called the 'Refining Company'), the party of the first part, MILON J. TRUMBLE, FRANCIS M. TOWNSEND, A. J. GUTZLER and JOHN H. RANDOLPH, all of the County of Los Angeles, State of California (hereinafter called the 'Stockholders'), the parties of the second part, the said MILON J. TRUMBLE, of the said County of Los Angeles, State of California (hereinafter called the 'Inventor'), the party of the third part, and ESPERANZA CONSOLIDATED OIL COMPANY, a corporation incorporated, organized and existing under the laws of the State of California (hereinafter called the 'Oil Company'), the party of the fourth part,

WITNESSETH

"WHEREAS, the Refining Company has an authorized capital stock of five million (5,000,000) shares, of the par value of one dollar ($1.00) per share, divided into two (2) classes, the one class being preferred capital stock and consisting of one million (1,000,000) shares, and the other class being common capital stock, and consisting of four million (4,000,000) shares; and

"WHEREAS, according to the representation made by the Refining Company and the Stockholders to the Oil Company, there are six hundred thousand (600,000) shares of the said preferred capital stock and two million four hundred thousand (2,400,000) shares of the said common capital stock issued and outstanding, and there are unissued four hundred thousand (400,000) shares of the said preferred capital stock and one million six hundred thousand (1,600,000) shares of the said common capital stock; and

"WHEREAS, according to the representations made by the Refining Company, the Stockholders and the Inventor to the Oil Company, the Inventor has invented valuable machines, apparatus and processes for the evaporation and refining of petroleum and other oils and liquids and gas, and patents for the same have been issued, and applications for other patents for the same are now pending, and the Inventor has assigned the same to the Refining Company, and contemplates and intends to assign to the Company further improvements and processes, in any manner relating to the same, which may from time to time hereafter be invented by him; and

"WHEREAS, it is deemed by the Refining Company to be for the advantage of the Refining Company that

the Oil Company shall become a stockholder in the Refining Company, relying on the representations made to the Refining Company by the Oil Company that the Oil Company will aid and assist the Refining Company in pushing the business of the Refining Company, and will do everything in its power to further the interests of the Refining Company; and

"WHEREAS, as a further consideration for the sale of the stock agreed to be sold to the Oil Company by the Stockholders at the price and at the times hereinafter provided, it is deemed by the Stockholders to be for the advantage of the Stockholders that the Oil Company shall become a stockholder in the Refining Company, relying on the representations made to the Stockholders by the Oil Company that the Oil Company will aid and assist the Refining Company in pushing the business of the Refining Company and will do everything in its power to further the interests of the Refining Company; and

"WHEREAS, the Oil Company, relying upon the rep-representations made to it, as hereinabove stated, deems it to be for its advantage to become interested in the Refining Company as a stockholder thereof;

"NOW, THEREFORE, in consideration of the respective representations aforesaid, and of the sale to, and the purchase by, the Oil Company of certain shares of the said capital stock, as hereinafter provided, the respective parties hereby covenant and agree to do and perform the things on its, their or his part to be done and performed as follows:

"1. The Refining Company hereby sells to the Oil Company, and the Oil Company hereby purchases from the Refining Company, two hundred thousand (200,000)

of the unissued shares of the said preferred capital stock, fully paid up, and eight hundred thousand (800,000) of the unissued shares of the said common capital stock, fully paid up, for the price of twenty-five thousand dollars ($25,000.00), in gold coin of the United States, to be paid by the Oil Company, as hereinafter provided, and on the conditions hereinafter provided:

"(a) The said sum of twenty-five thousand dollars ($25,000.00) shall be deposited by the Oil Company with the National Bank of California of Los Angeles, to the credit of the Refining Company, in such installments, as and when the same shall be needed by the Refining Company, for the purpose hereinafter provided, and on demand made therefor by the Refining Company on the Oil Company;

"(b) The purpose for which the said sum of twenty-five thousand dollars ($25,000.00) shall be used by the Refining Company shall be, so far as the same shall be necessary therefor, to obtain patents for the said inventions and processes, in this country and in foreign countries; it being understood, however, that such portion of the said sum as shall not be necessary for the purpose aforesaid, shall be thereafter deposited by the Oil Company, with the said Bank, to the credit of the Refining Company, on demand made by the Refining Company therefor on the Oil Company, for use by the Refining Company in the conduct of the business of the Refining Company; and it being further understood that the Oil Company shall have the right, without any demand being made therefor upon the Oil Company, to deposit, with the said Bank, to the credit of the Refining Company, all or any portion of the said sum;

"(c) Immediately upon the execution of this agreement the Refining Company shall deposit with the said Bank certificates for two hundred thousand (200,000) fully paid up shares of the said preferred capital stock, and certificates for eight hundred thousand (800,000) fully paid up shares of the said common capital stock, with instructions to the said Bank to deliver to the Oil Company certificates for eight (8) shares of the said preferred capital stock, and certificates for thirty-two (32) shares of the said common capital stock, for every dollar deposited by the Oil Company, with the said Bank, to the credit of the Refining Company, when and as the same shall be so deposited, and if the Oil Company shall fail to deposit any part of the said sum of twenty-five thousand dollars ($25,000.00) in the said Bank, to the credit of the Refining Company, to return to the Refining Company all of the certificates for the said two hundred thousand (200,000) shares of preferred capital stock and all the certificates for the eight hundred thousand (800,000) shares of the common capital stock, so deposited by the Refining Company, which shall not have been theretofore delivered by the Bank to the Oil Company, on the expiration of five (5) days after demand therefor made in writing by the Refining Company on the Oil Company, at the office of the Oil Company, in the Alaska Commercial Building, in the City and County of San Francisco, State of California.

"2. The Stockholders hereby sell to the Oil Company, and the Oil Company hereby purchases from the Stockholders, two hundred thousand (200,000) of their fully paid up issued shares of the said preferred capital stock, and eight hundred thousand (800,000) of their fully paid up issued shares of the said common capital stock, for the

price of fifty thousand dollars ($50,000.00) in gold coin of the United States, to be paid by the Company, as hereinafter provided, and on the conditions hereinafter provided:

"(a) The said sum of fifty thousand dollars ($50,000.00) shall be deposited by the Oil Company, with the said Bank, to the credit of the Stockholders, in equal monthly installments of ten thousand ($10,000.00), beginning on or before the first day of each month, beginning on the 1st day of May, A. D. 1911, until the said sum shall have been fully deposited, together with interest on all deferred payments, in like gold coin, at the rate of six (6) per cent, per annum, until paid.

"(b) Immediately upon the execution of this agreement the Stockholders shall deposit with the said Bank certificates for two hundred thousand (200,000) fully paid up shares of the said preferred capital stock and eight hundred thousand (800,000) fully paid up shares of the said common capital stock, with instructions to the said Bank to deliver to the Oil Company certificates for four (4) shares of the said preferred capital stock and certificates for sixteen (16) shares of the said common capital stock for every dollar deposited by the Oil Company with the said Bank to the credit of the Stockholders, when and as the same shall be so deposited, and if the Oil Company shall fail to deposit any part of the said sum of fifty thousand dollars ($50,000.00) in the said Bank, to the credit of the Stockholders, on the expiration of five (5) days after demand therefor made in writing by the Stockholders on the Oil Company, at the said office of the Oil Company, at any time after the first day of the month on which the same should be so deposited by the Oil Company, to return to the Stockholders all of the

certificates for the said two hundred thousand (200,000) shares of preferred capital stock, and eight hundred thousand (800,000) shares of common capital stock, so deposited by the Stockholders, which shall not have been theretofore delivered by the Bank to the Oil Company, whereupon the obligations of the Oil Company shall be at an end.

"3. The remaining two hundred thousand (200,000) unissued shares of the said preferred capital stock, and the remaining eight hundred thousand (800,000) unissued shares of the said common capital stock shall not be sold, or otherwise disposed of, by the Refining Company, without the consent in writing of the Oil Company, and as security for the performance of this obligation by the Refining Company, the Refining Company shall issue a certificate for the said two hundred thousand (200,000) unissued shares of the said preferred capital stock, and a certificate for the said eight hundred thousand (800,000) unissued shares of the said common capital stock, to Charles W. Slack, as Trustee, who shall hold the same, but without any rights of a stockholder in the Refining Company by reason thereof, subject to the joint demand of the Refining Company and of the Oil Company.

"4. The Refining Company shall take such steps as the attorney for the Oil Company shall deem to be necessary, for the purpose of perfecting the organization of the Refining Company, and for the purpose of adopting such a code of by-laws, in place of the existing code of by-laws, as the said attorney shall deem to be necessary, and shall also cause to be prepared such new forms of certificates for shares of the preferred capital stock, and for shares of the said common capital stock, as the said attor-

ney shall deem to be necessary, in place of the existing certificates, all for the benefit of all persons concerned.

"5. The Refining Company shall prosecute with all reasonable diligence to the patents therefor, all pending applications for patents for the said inventions and processes.

"6. The Inventor shall assign to the Refining Company all patents for future improvements and processes, in any manner relating to the above mentioned inventions and processes, and all patents therefor shall belong to, and by the property of, the Refining Company.

"7. The Esperanza Company shall be entitled to use the said inventions and processes in the operation and conduct of its business under no more favorable terms and conditions than a like use shall be permitted by the Refining Company to other persons and corporations under similar conditions.

"8. The Stockholders and the Oil Company shall appoint, and they do hereby severally appoint, Charles W. Slack their and each of their true and lawful attorney, with power to vote at all meetings of stockholders of the Refining Company, held for the purpose of electing directors at any time during the period of three (3) years from and after the date hereof. For the purpose of insuring the carrying out of this provision, the Stockholders shall deposit with the said Charles W. Slack, within the period of five (5) days from and after the date hereof, all their certificates of stock issued by the Refining Company, and the Oil Company shall deposit with the said Charles W. Slack all the certificates of stock of the Refining Company which shall have been delivered to the

Oil Company, under the provisions of this agreement, forthwith upon delivery of the same to the Oil Company. The said Charles W. Slack shall vote the said stock for such directors as shall have been designated prior to each meeting of the stockholders of the Refining Company, held for the purpose of electing directors, by a majority of six (6) persons, three (3) of whom shall be selected by the Stockholders and three (3) of whom shall be selected by the Oil Company. The power hereby conferred upon the said Charles W. Slack shall be deemed a power coupled with an interest, and shall not be revocable during the said period of three (3) years, except by a writing declaring such revocation, executed by the Stockholders and by the Oil Company, holding at least two-thirds (2/3) of the stock evidenced by the certificates deposited with the said Charles W. Slack. At the expiration of the said period of three (3) years or on the prior revocation of the power herein conferred, as hereinabove provided, the said Charles W. Slack shall redeliver to the respective certificates deposited by them hereunder. Any other stockholder of the Refining Company may deposit his certificates of stock issued by the Refining Company with the said Charles W. Slack, and the same shall be held by the said Charles W. Slack subject to this provision, as though such stockholder had been named as a party to the same.

"9. If the owner of any shares of stock of the Refining Company, the certificates for which shall have been deposited under the preceding paragraph 8 of this agree-

ment, shall desire to sell any of the said shares evidenced by the certificates so deposited, such owner shall first offer such shares for sale to the Refining Company, and if the Refining Company shall not desire to purchase the same, such owner shall next offer such shares for sale to the other said owners, and if the latter shall not desire to purchase the same, such owner may then sell such shares to third persons, but in no event shall a sale to third persons be made at a less price than the price at which the said shares shall have been offered to the Refining Company, or to the other said owners. All offers of sale under this provision to the Oil Company may be addressed to the said Charles W. Slack, at his office in the Alaska Commercial Building, in the City and County of San Francisco, State of California.

"IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in six (6) counterparts, each of which shall be deemed an original, the day and year first hereinabove written.

TRUMBLE REFINING COMPANY

By F. M. TOWNSEND, President;

By A. J. GUTZLER, Asst. Secy.

M. J. TRUMBLE (SEAL)
F. M. TOWNSEND (SEAL)
A. J. GUTZLER (SEAL)

ESPERANZA CONSOLIDATED OIL COMPANY

By E. J. deSABLA, President

By J. MATHISON, Assistant Secy.

"EXHIBIT B

"TRUMBLE REFINING COMPANY OF ARIZONA

CONTRACTS HELD AS OF MARCH 1, 1913, AND PRESENT WORTH OF ROYALTIES AS OF THAT DATE

	CONTRACT NUMBER																
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Licensee	Petroleum Development Company	Coalinga National Oil Company	Jno. R. Ott Contracting Company	General Petroleum Corporation	Recovery Oil Company	General Petroleum Corporation	General Petroleum Corporation	General Petroleum Corporation	General Petroleum Corporation	Santa Maria Oil Fields of Cal.	Warner Quinlan Asphaltum Co.	Pacific Crude Oil Company	American Union Oil Refining Co.	Santa Maria Oil Fields of Cal.	General Petroleum Corporation	General Petroleum Corporation	General Petroleum Corporation
Date of license	Sep. 27, 1910	July 10, 1911	Feb. 15, 1912	Apr. 12, 1911	Mar 18 1912	Apr. 12, 1911	Apr. 12, 1911	Apr. 12, 1911	Apr. 12 1911	Sep. 28, 1912	Oct. 26, 1912	Nov. 30, 1912	Jan. 8, 1913	Feb. 8, 1913	Apr. 12, 1911	Apr. 12, 1911	Apr. 12, 1911
Patents licensed	996,736	996,736	996,736 1,002,474	996,736	996,736	996,736	996,736	996,736	996,736 1,002,474	996,736	996,736 1,002,474	996,736	996,736 1,002,474	996,736 1,002,474	996,736 1,002,474	996,736 1,002,474	996,736 1,002,474
Plant location	Fellows	Coalinga	Los Angeles ~~Nov. 19~~	Sibyl Lease	Fellows	Nevada-Midway	Olinda-Delaware Union	Brea Canyon	Kerto	Cat Canyon	Warner, N. J.	Fellows	Tulare	Cat Canyon	Kerto	Vernon	Mojave
Plant erected	Jan. 1911	July, 1911	Nov. 1911	July, 1912	July, 1912	July, 1912	Sept., 1912	Sept. 1912	Aug. 1912	Dec. 1912	Nov. 1912 June 1913	Dec. 1912 Mar. 1913	Feb. 1913		Jan. 29, 1913	May 15, 1913	
Plant capacity in bbls. per annum	3,285,000	365,000	365,000	182,500	365,000	365,000	273,750	273,750	365,000	730,000	730,000	1,825,000	365,000	Extension #10	Extension #9	7,300,000	3,650,000
Estimated oil run per annum	2,463,750		54,750	50,000		120,000	136,875		182,500	365,000	365,000	941,250	182,500			5,475,000	2,737,500
Royalty per barrel	1-½¢	2¢	5¢	1¢		1¢	1¢		1-½¢	2¢	1-3/4¢	1-1/4¢	2-½¢			1-½¢	1-½¢
Estimated royalty per annum	$ 36,956.25		$ 2,737.50	$ 500.00		$ 1,200.00	$ 1,368.75		$ 2,737.50	$ 7,300.00	$ 6,387.50	$ 11,765.63	$ 4,562.50			$ 82,125.00	$ 41,062.50
Life of license, in years, from March 1, 1913	15-1/3	15-1/3	15-½	10	12	5	15-1/3	15-1/3	15-½	15-1/3	15-½	15-1/3	15-½			15-½	15-½
PRESENT WORTH OF ROYALTIES ON 8% BASIS:																	
1913	$ 34,646.48		$ 2,566.41	$ 468.75		$ 1,125.00	$ 1,283.20		$ 1,710.94	$ 6,843.75	$ 2,994.14	$ 8,272.90	$ 2,138.67			$ 38,496.09	$ 19,248.05
1914	32,080.08		2,376.30	434.03		1,041.67	1,188.15		1,584.20	6,336.81	5,544.70	10,213.22	3,960.50			71,289.06	35,644.53
1915	29,703.77		2,200.28	401.88		964.51	1,100.14		1,466.85	5,867.41	5,133.99	9,456.69	3,667.13			66,008.39	33,004.19
1916	27,503.49		2,037.30	372.11		893.06	1,018.65		1,358.20	5,432.79	4,753.69	8,756.19	3,395.49			61,118.87	30,559.44
1917	25,466.19		1,886.38	344.55		697.70	943.19		1,257.59	5,030.36	4,401.56	8,107.58	3,143.97			56,591.54	28,295.77
1918	23,579.81		1,746.65	319.02			873.33		1,164.43	4,657.74	4,075.52	7,507.02	2,911.09			52,399.57	26,199.78
1919	21,833.15		1,617.27	295.39			808.64		1,078.18	4,312.72	3,773.63	6,950.94	2,695.45			48,518.11	24,259.06
1920	20,215.88		1,497.47	273.51			748.74		998.31	3,993.26	3,494.10	6,436.06	2,495.79			44,924.17	22,462.09
1921	18,718.40		1,386.55	253.25			693.27		924.37	3,697.46	3,235.28	5,959.31	2,310.91			41,596.45	20,798.23
1922	17,331.85		1,283.84				641.92		855.89	3,423.58	2,995.63	5,517.88	2,139.73			38,515.23	19,257.61
1923	16,048.01		1,188.74				594.37		792.49	3,169.98	2,773.73	5,109.15	1,981.24			35,662.25	17,831.12
1924	14,859.27		1,100.69				550.34		733.79	2,935.16	2,568.27	4,730.69	1,834.48			33,020.60	16,510.30
1925	13,758.58		1,019.15				509.58		679.44	2,117.74	2,378.03	4,380.27	1,698.59			30,574.62	15,287.31
1926	12,739.42		943.66				471.83		629.11	2,516.43	2,201.88	4,055.80	1,572.77			28,309.83	14,154.91
1927	11,795.76		873.76				436.88		582.51	2,330.03	2,038.77	3,755.37	1,456.27			26,212.80	13,106.40
1928	3,829.79		420.08				141.84		280.05	756.50	980.18	1,219.28	700.13			12,602.31	6,301.15
TOTAL	$1,668,294.52	$324,109.93		$24,144.53	$ 3,162.49		$ 4,721.94	$12,004.07		$16,096.35	$63,421.72	$53,343.10	$100,428.35	$38,102.21			$685,839.89	$342,919.94

"EXHIBIT C

"THIS AGREEMENT, made and entered into this 2nd day of APRIL, A. D. 1915, by and between TRUMBLE REFINING COMPANY, a corporation organized and existing under the Laws of the State of Arizona, the party of the first part, and W. MEISCHKE SMITH, of the City and County of San Francisco, State of California, party of the second part.

WITNESSETH:

"WHEREAS, the first party is the owner of certain Letters Patents of the United States, and Letters Patents of foreign countries, and is also the owner of inventions of MILON J. TRUMBLE, upon which inventions applications for patents have been made in the United States of America, as set forth more particularly in the schedule marked 'A' hereto annexed, to which specific reference is hereby made and by such reference is hereby made a part hereof, and;

"WHEREAS, by the terms of that certain agreement dated April 12, 1911, MILON J. TRUMBLE has agreed to assign and deliver to the first party the full right, title and interest in and to any inventions, and Letters Patents that may issue thereon, relating to the Treating or Refining of Oils, and;

"WHEREAS, the first party has entered into certain license agreements relating to the operation of certain apparatus for the Treating or Refining of Oil, which said agreements are set forth more particularly in schedule 'B' attached hereto, and by reference hereby made a part hereof, and;

"WHEREAS, the second party is desirous of acquiring all rights held by the first party under those certain patents and inventions set forth in schedule 'A' hereinabove referred to, together with all future inventions and Letters Patents having to do with the Treating or Refining of Oil which may hereafter become the property of the first party as assignee of MILON J. TRUMBLE, exclusive of any and all rights held by the first party under those certain license agreements set out in schedule 'B' hereinabove referred to.

"NOW, THEREFORE, in consideration of the respective representations aforesaid, and of the sale to, and purchase by, the second party of certain property as hereinafter provided, and respective parties hereby covenant and agree to do and perform the things on its, their, or his, part to be done and performed, as follows:

"1. The first party hereby sells to the second party, and the second party hereby purchases, all of that certain property set forth in schedule 'A' hereinabove referred to, excepting any and all the rights now held by the first party in and by virtue of those certain agreements set forth in schedule 'B', which rights are hereby expressly reserved in the first party for its sole and exclusive benefit. The said party of the first part does by these presents warrant that the title hereby agreed to be conveyed, and which may hereafter be conveyed, in pursuance of this agreement, to any of the said patents and inventions set forth in schedule 'A' hereof is good and sufficient and that the instruments of conveyance thereof herein provided to be executed from the party of the first part to the party of the second part shall pass, and be sufficient to pass, a free and unincumbered title to each and all of the said invention and patents, and this warranty shall be

a continuing warranty not satisfied or discharged by the acceptance of any particular assignments.

"2. The second party agrees to purchase the said property set forth in Schedule 'A' hereinabove referred to, excepting those rights in schedule 'B' hereinabove referred to, and agrees to pay to the party of the first part for such property the sum of ONE MILLION DOLLARS ($1,000,000.00), said sum of ONE MILLION DOLLARS ($1,000,000.00) to be paid as follows: The sum of NINE HUNDRED THOUSAND DOLLARS ($900,000.00) upon the execution of these presents, the receipt of which is hereby acknowledged, and the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) upon the execution and delivery by the party of the first party to the party of the second part of the instruments, transfers and conveyances necessary and proper to transfer a good and sufficient title to said property described in said schedule 'A' to the party of the second part.

"3. The first party further agrees to execute and deliver to the second party at his order any and all instruments necessary to vest in the second party, or in any person, firm, or corporation, designated by the second party, full and complete title in and to the said property hereby transferred, such designation of transferee however to be made by the second party within a period of Sixty (60) days from and after the date of this agreement. The party of the first part hereby covenants and agrees that at any future time to execute any further or additional transfers, deeds, assignments, or other instruments which may be found necessary or proper to complete or effectuate the transfer of the property herein contemplated to be transferred from the party of the first

part to the party of the second part, or which shall be required by any rule or regulation of any foreign country or the United States, notwithstanding any previous attempt to transfer such interest; all transfers herein contemplated shall be prepared, executed and delivered at the expense of the party of the first part.

"4. The first party hereby assigns and transfers to the second party all rights held by it under and by virtue of those certain license agreements entered into by the first party, and more particularly designated as follows:

"Contract dated May 5, 1914, between Trumble Refining Company and American Gasoline Company;

"Contract dated July 28, 1914, between Trumble Refining Company and Anglo Saxon Petroleum Company, Limited, and;

"Contract dated September 22nd, 1914, between Trumble Refining Company and Anglo Saxon Petroleum Company, Limited.

"5. The first party further agrees to transfer any and all Letters Patents or inventions relating to the Treating or Refining of Oil which said first party may hereafter acquire from Milon J. Trumble, and hereby agrees to set over the same to the second party, or to any person, firm or corporation, designated by the second party, it being understood and agreed that any expense necessarily incurred by the first party, or by MILON J. TRUMBLE, in perfecting said invention or inventions, shall be paid by the second party to the first party at the time of making such transfer or transfers. That the cost and expenses above referred to shall not include any charge for the personal time of the said MILON J. TRUMBLE, or any officer of the party of the first part herein.

"6. The party of the second part does hereby expressly covenant, agree and warrant that he will not in any manner interfere with the free exercise and enjoyment by the party of the first part of the licenses or agreements referred to in schedule 'B', and that he will not in any manner interfere with the free exercise and enjoyment of such licenses and agreements by the persons to whom they have been executed by the party of the first part; and that he will not acquire or attempt to acquire the rights or privileges extended to said persons by said agreements; that he will not execute to such persons any license or privilege under the patents or patent rights herein agreed to be transferred to him, or any of the privileges granted to such persons by the respective agreements under which they hold as the same are provided in said schedule 'B', and that he will not acquire any of the property leased or conceded to such parties under such schedule 'B', except subject to the royalties now imposed by the licenses referred to in schedule 'B'.

"7. It is further understood and agreed that the second party may have access to the books and records of the first party at any time for the purpose of ascertaining the status of the first party and its licenses, as set forth in schedule 'B' hereto attached, with a view to ascertaining whether the said licensees are exceeding the rights given under the respective licenses.

"8. The said party of the first part does hereby covenant and agree by and with the party of the second part that it will not grant to any of the persons who are parties to the licenses or agreements referred to in schedule 'B' hereof any right or privilege by way or enlargement or extension of said agreements in schedule 'B' hereof, whereby said persons shall or may be entitled to exercise

said privileges conferred upon them by any of said agreements at any other place, or to any greater extent, or in any other manner than is now fixed and granted to said parties by said agreements, and will not consent to a transfer of any of said agreements to any other or different parties, except where said transfer is given as a matter of right by the terms of such agreements and where the same could be enforced without the consent of the party of the first part.

"9. It is further understood and agreed that the second party has the right and privilege to call on the first party for, and the first party agrees to produce, any documents in the possession of the first party that may aid or assist the second party in establishing any title or right hereby transferred to the second party.

"IN WITNESS WHEREOF, the first party has caused its corporate name to be hereunto subscribed by its President and its corporate seal to be affixed, and attested by its Secretary, and the second party has hereunto set his hand and seal, the day and year in this agreement first above written.

TRUMBLE REFINING COMPANY
By F. M. TOWNSEND, President.

W. MEISCHKE-SMITH (SEAL)
Second Party.

ATTEST:
FRANK L. A. GRAHAM,
Secretary.

IN PRESENCE OF:
P. H. SHELTON
ISABEL HALL

"SCHEDULE 'A'

UNITED STATES PATENTS ISSUED

No. 996,736, for EVAPORATORS FOR PETROLEUM OILS OR OTHER LIQUIDS, issued July 4, 1911.

No. 1,002,474, for APPARATUS FOR REFINING PETROLEUMS, issued September 5, 1911.

No. 1,070,361, for PROCESSES OF REFINING PETROLEUM OR SIMILAR OILS AND APPARATUS FOR CARRYING ON THESE PROCESSES, issued August 12, 1913.

UNITED STATES PATENTS PENDING

(1) PROCESSES FOR REFINING PETROLEUM, filed September 27, 1909, Serial No. 519,883.

(2) PROCESS OF TREATING PETROLEUM, filed October 10, 1910, Serial No. 586,382.

(3) PROCESS AND APPARATUS FOR MAKING ASPHALTUM, filed September 16, 1912, Serial No. 720,687.

(4) APPARATUS FOR HEATING PETROLEUM OILS, filed September 16, 1912, Serial No. 720,688.

(5) PROCESS AND APPARATUS FOR DISTILLING AND REFINING OILS, filed September 16, 1912, Serial No. 720,689.

(6) APPARATUS FOR DISTILLING AND REFINING OILS, filed December 1, 1913, Serial No. 804,124. (Divisional application.)

(7) DOUBLE EVAPORATOR AND PROCESS OF TREATING PETROLEUM OILS, filed December 5, 1914, Serial No. 875,737.

Converter
Cases:

(8) PROCESS OF PRODUCING LIGHT HYDROCARBON OIL FROM A HEAVIER SERIES OF THE SAME, filed March 13, 1915, Serial No. 14,102.

(9) APPARATUS FOR PRODUCING LIGHT HYDROCARBON OIL FROM A HEAVIER SERIES OF THE SAME, executed March 22, 1915.

(10) PROCESS AND APPARATUS FOR REDUCING THE VISCOSITY OF HEAVY HYDROCARBONS, executed March 13, 1915.

(11) PROCESS AND APPARATUS FOR REDUCING THE VISCOSITY OF PETROLEUM RESIDUES, executed March 22, 1915.

ISSUED FOREIGN PATENTS

EVAPORATOR:

COUNTRY	NUMBER	DATE
Ceylon	1206	July 26, 1911
India	397	Oct. 20, 1911
Mysore	1	Mar. 23, 1912
Perak	10	May 24, 1911
Straits Settlements	450	Aug. 9, 1911
Jamaica	....	July 25, 1911
Grenada	1	July 10, 1911
Newfoundland	128	Dec. 23, 1911
Trinidad	4	Aug. 31, 1911
Orange River Colony	967	July 8, 1911
Transvaal	383	July 8, 1911
Tunis	1159	June 26, 1911
Cape Colony	4958	July 15, 1911
Liberia	110703	July 21, 1911
Mauritius	....	Nov. 3, 1911
Natal	141	July 10, 1911
Rhodesia	749	July 17, 1911
Zanzibar	1	Jan. 15, 1912
Switzerland	57547	June 16, 1911
Belgium	236771	June 17, 1911
France	431142	June 16, 1911
Luxemburg	9071	June 20, 1911
Hungary	56100	June 21, 1911
Norway	22426	June 17, 1911

Portugal	7843	Oct. 13, 1911
Roumania	2273	June 9, 1911
Spain	50810	July 31, 1911
Turkey	1946	July 1, 1911
Denmark	16647	Oct. 30, 1912
Finland	4711	Jan. 18, 1912
Itay Reg. Gen. 86/118263 Reg. Att. 360/158		June 30, 1911
Japan	21962	Apr. 6, 1912
Australia	1788	July 12, 1911
New Zealand	29868	July 14, 1911
Fiji Islands No. registered in Book 1, Folio 48		July 10, 1912
Belgian Congo	291	June 20, 1911
Argentine Republic	8966	Feb. 12, 1912
Bolivia	....	July 2, 1912
Ecuador	42	Aug. 21, 1911
Mexico (Process)	11869	June 14, 1911
Mexico (Apparatus)	11870	June 14, 1911
Nicaragua	31	Aug. 22, 1911
Uruguay	573	Nov. 23, 1912
Venezuela	281	Nov. 30, 1911
Chili	2550	Oct. 2, 1911
U. S. of Columbia	1095	Nov. 11, 1911
Brazil	6821	Nov. 29, 1911
Peru	392	Mar. 29, 1912
Canada	144252	Nov. 26, 1912

Gambia	....	Apr. 2, 1912
Northern Nigeria	23	Mar. 10, 1913
Southern Nigeria	....	July 11, 1911
Russia	25092	Sept. 30, 1913

(Russian Style)

COUNTRY	NUMBER	DATE
Cuba	1933	Feb. 3, 1914
Honduras	8966	Nov. 19, 1913
Great Britain	14161	June 14, 1911
Pahang	64	May 24, 1911
Paraguay	....	Jan. 18, 1913
Egypt	135	May 5, 1913
Sweden	35315	June 13, 1911
Germany	261641	June 17, 1911
Austria	61361	May 1, 1913
St. Helena	....	June 13, 1913
Seychelles Islands	....	Jan. 13, 1913
Gold Coast Colony	100	Jan. 5, 1912
St. Lucia	....	Aug. 21, 1911
St. Vincent	1	July 10, 1911
Leeward Islands	3	July 25, 1911
Falkland Islands	1020	June 9, 1913
Negri Sembilan	1	May 24, 1911
Hong Kong	8	July 21, 1913
Selangor	72	May 7, 1912
British North Borneo	63	Aug. 24, 1911

ALLOWED, BUT NOT RECEIVED

Costa Rica
Guatemala
San Salvador

FOREIGN PATENTS ISSUED

EVAPORATING APPARATUS FOR PETROLEUM OILS AND THE LIKE

	COUNTRY	NUMBER	DATE
Title Complete	Canada	149,128	July 8, 1913
	Mexico	14,078	Apr. 10, 1913
Title not Complete	Roumania	3,468	Sept. 21, 1913
	England	22497/13	Jan. 14, 1913

FOREIGN PATENTS PENDING

Holland (Title not complete)
Russia (Title complete)

FOREIGN PATENTS ISSUED

PROCESS AND APPARATUS FOR REFINING PETROLEUM (Separator)

	COUNTRY	NUMBER	DATE
Title Complete	Mexico	9,051	May 17, 1909
	Canada	119497	July 20, 1909
	Austria	54082	Jan. 1, 1912
	Russia	22243	Aug. 28, 1912

"SCHEDULE 'B'

CONTRACTS

Trumble Refining Company (Cal. Corp.) and Petroleum Development Company, dated September 27, 1910.

Trumble Refining Company (Cal. Corp.) and Coalinga National Oil Company, dated July 10, 1911.

Trumble Refining Company (Cal. Corp.) and John R. Ott Contracting Company, dated February 15, 1912.

Trumble Refining Company (Cal. Corp.) and General Petroleum Company, dated March 15, 1912.

Trumble Refining Company (Cal. Corp.) and Recovery Oil Company, dated March 18, 1912.

Trumble Refining Company (Cal. Corp.) and General Petroleum Company, dated May 15, 1912.

Trumble Refining Company (Cal. Corp.) and General Petroleum Company, dated June 26, 1912.

Trumble Refining Company (Cal. Corp.) and General Petroleum Company, dated June 26, 1912.

Trumble Refining Company (Ariz. Corp.) and General Petroleum Company, dated August 29, 1912.

Trumble Refining Company (Ariz. Corp.) and Santa Maria Oil Fields of California, Limited, dated September 28, 1912.

Trumble Refining Company (Ariz. Corp.) and Warner-Quinlan Asphaltum Company, dated October 26, 1912.

Trumble Refining Company (Ariz. Corp.) and Pacific Crude Oil Company, dated November 30, 1912.

Trumble Refining Company (Ariz. Corp.) and American Union Oil & Refining Company, dated January 8, 1913.

Trumble Refining Company (Ariz. Corp.) and Santa Maria Oil Fields of California, Limited, dated February 8, 1913.

Trumble Refining Company (Ariz. Corp.) and General Petroleum Company, dated June 11, 1913.

Trumble Refining Company (Ariz. Corp.) and General Petroleum Company, dated June 11, 1913.

Trumble Refining Company (Ariz. Corp.) and General Petroleum Company, dated June 11, 1913.

Trumble Refining Company (Ariz. Corp.) and North American Oil Consolidated, dated November 14, 1913.

"We, the undersigned, Stockholders of TRUMBLE REFINING COMPANY, owning and holding as his separate right the number of shares set opposite his name, and owning and holding in the aggregate more than two-thirds (2/3) of the subscribed, issued, capital stock of said TRUMBLE REFINING COMPANY, do hereby expressly consent to the execution of the foregoing agreement and do hereby expressly consent and concur in and request the officers and Board of Directors of said TRUMBLE REFINING COMPANY as the same are now constituted, or may hereafter be constituted, to exe-

cute any or all assignments, transfers, deeds or other papers necessary to carry out the terms of the foregoing agreement and to transfer unto the purchaser therein named the property therein contemplated to be transferred, hereby stipulating that this consent shall apply not only to this agreement but to any other instrument referred to or contemplated by this agreement, or necessary or proper to carry it into effect.

MILON J. TRUMBLE	Shares owned	887,681.
F. M. TOWNSEND	Shares owned	383,407.
A. J. GUTZLER	Shares owned	363,628.
.....	Shares owned	.....
GENERAL PETROLEUM) COMPANY) By JOHN BARNESON) President	Shares owned	1,999,980

Attest:

C. R. STEVENS
Secretary

"Office of

TRUMBLE REFINING COMPANY,
Los Angeles, California.

"I, FRANK L. A. GRAHAM, Secretary of the TRUMBLE REFINING COMPANY, do hereby certify that each of the foregoing persons whose names are signed to said consent to the foregoing contract, were, at the date of the execution of said consent the owners and holders of the shares of stock set opposite their respective names upon the books of said corporation.

FRANCIS M. TOWNSEND . . .	383,407 shares
MILON J. TRUMBLE	887,681 shares
A. J. GUTZLER	363,628 shares
GENERAL PETROLEUM COMPANY	1,999,980 shares

and that the said persons ever since have been and now are the owners and holders of such shares of stock on the books of said corporation.

"I further certify that the total authorized capital stock of said TRUMBLE REFINING COMPANY is FIVE MILLION shares, and that the total number of shares which have been subscribed and issued is FOUR MILLION shares.

"IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said TRUMBLE REFINING COMPANY, this 7th day of April, 1915.

FRANK L. A. GRAHAM
Secretary of
TRUMBLE REFINING COMPANY

"EXHIBIT D

COPY OF EXTRACT FROM THE PRESIDENT'S REPORT FOR THE YEAR 1915

" 'The President desires further to report that the contract entered into with W. Meischke-Smith does not affect the business of the corporation in so far as any outstanding licenses of this corporation are concerned. In other words, Trumble Refining Company retains all business from which it had in the past received any profit or income.'

"EXHIBIT E

"January 6, 1921

"Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

"In the month of April, 1911, the General Petroleum Company, which was at that time the Esperanza Oil Company, entered into an agreement with the Trumble Refining Company of Arizona, covering the use of an oil refining process, realizing that this process affected a great saving of oils treated and was much less expensive of installation and was much more economical in operation than any other process known. Under this agreement the Esperanza Oil Company contemplated the construction of a pipe line from the oil fields to Los Angeles and the construction of plants for the use of the process for refining this oil.

"In the month of July, 1912, a plant located at Kerto, California, was completed and commenced operation with a capacity of 2,500 barrels per day and early in 1913 the pipe line was completed to Los Angeles and plant put in operation with a capacity of 20,000 barrels and in July, 1913, a plant with a capacity of 10,000 barrels was completed at Mojave, California, which was later on moved to Los Angeles. All of this installation of refining plants was in conformity to agreements made in April, 1911.

Yours very truly,

GENERAL PETROLEUM CORPORATION,

By (signed) John Barneson,

President.

"EXHIBIT F

"January 6, 1921

"Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

"In the month of April, 1915, we purchased from the Trumble Refining Company of Arizona, all of its letter patents of the United States and patents pending in the United States, together with all foreign rights thereto, covering a process for refining petroleum for which we paid in cash $1,000,000.00. The Trumble Refining Company of Arizona retained all contracts which were then in existence, covering the use of these patents, representing business which had been developed up to that time. Trumble Refining Company informs us that they have the following contracts:

General Petroleum Corporation	Capacity of Plant	25,000 bbls.
Petroleum Development Company	" " "	6,000 "
Santa Maria Oil Fields Company	" " "	2,000 "
Warner Quinlan Company	" " "	2,500 "
J. R. Ott Contracting Company	" " "	1,000 "
Total daily capacity		36,000 "

"A conservative estimate of oil run through the plants would be about 25,000 barrels per day, making the estimated annual output 9,125,000 barrels. With royalty at the rate of 1-1/2¢ per barrel would give a gross annual income of $136,875.00.

"With these facts the Board of Directors of the Trumble Refining Company of Arizona informs us that they have placed a value on these contracts at that time of $811,821.36, and we have been requested to give our opinion as to the value of these contracts.

"Having made a thorough investigation at the time we purchased these patents and being acquainted with the possibilities of the Trumble process, we believe that the value placed on these contracts by the Trumble Refining Company of Arizona was conservative.

Yours very truly,

SHELL COMPANY OF CALIFORNIA

(signed) J. C. Van Eck,
President.

"EXHIBIT G

"July 23, 1913.

"Mr. F. P. S. Harris,
Kohl Building,
San Francisco, California.

Dear Sir:

"Upon my return from the East, Messrs. Trumble and Gutzler brought up the matter of sale of foreign rights under the Trumble Patents and have informed me that you are particularly interested in Borneo, Sumatra, Roumania and Russia, in which you have a production of approximately 21,000,000 barrels per year.

"Estimating that your people will have a refining capacity of at least 21,000,000 barrels per year in the countries named, and that if the Trumble system was used, the savings thereby, over the ordinary processes, should be about as follows, for a period of say five years:

Saving in maintenance	$ 500,000.00
Saving in labor, fuel, and general cost of operation	3,150,000.00
Saving in volume of oil refined over and above all old processes, estimated to be at least 2¢ per barrel	2,100,000.00
Total	$5,750,000.00

There should be added to this amount the saving in cost of Trumble plants over the cost of the old style refineries, of at least	1,000,000.00
Total	$6,750,000.00
Or divided by five, making a total saving of	$1,350,000.00
	per year

"Another feature to be considered in connection with the installation of the Trumble system is the quickness with which plants can be assembled and put in operation; also the ease with which all of the apparatus can be shipped from the place of manufacture to the points desired.

"I have not conferred with a full Board of Directors in regard to this matter, but believe that the price of $2,500,000.00 would be accepted by them as full payment for the rights in these countries. This statement is made with the reservation that other parties are considering the purchase of foreign rights and in the event that they should conclude to do business with us before the time your company should decide to accept this proposition, we are to be at liberty to transact business with the other parties.

Very truly yours,

(s) F. M. Townsend.

FMT–G

"EXHIBIT H

"TRUMBLE REFINING COMPANY OF ARIZONA
916 Higgins Building,
Los Angeles, California.

COMPUTATION OF TAXES

1916

Net income as reported		$ 82,702.83
Add depreciation of machinery in excess of agent's allowance		29.19
Total		$ 82,732.02
Deduct:		
Depreciation of patent rights	$54,121.42	
Additional depreciation of furniture and fixtures allowed by agent	40.14	
Loss on plant abandoned	595.00	54,756.56
Net income, as revised		$ 27,975.46
Tax at 2%		$ 559.51
Tax paid		1,656.04
Refund due		$ 1,096.53

1917

Net income, per agent		$ 88,727.83
Add interest accrued but not taken up by agent		460.00
Total		$ 89,187.83
Deduct:		
Royalties for 1916 taken up by agent	$ 206.57	
Depreciation of patent rights	54,121.42	
		54,327.99
Net income, as revised		$ 34,859.84

SCHEDULE 'A'

Capital stock and surplus, per agent	$1,137,221.70
Deduct surplus	17,221.70
Schedule 'A', as revised	$1,120,000.00

SCHEDULE 'B'

Total, per agent	$ 10,926.23

SCHEDULE 'C'

Total, per agent	$1,079,487.22
Add liquidating dividends	185,057.41
Total	$1,264,544.63
Deduct royalty contracts included by agent in error	811,821.36
Schedule 'C', as revised	$ 452,723.27

SCHEDULE 'D'

		Adjusted Average
Revised 1916 income tax pro rated		$ 304.62
Add:		
Dividend, January 15	$32,000.00	
Less earnings for 14 days— 14/365 of $34,859.84	1,337.09	
Remainder	$30,662.81	29,486.70
Dividend, May 1	$16,000.00	
Less earnings for 106 days— 106/365 of $34,859.84	10,123.68	
Remainder	$ 5,876.32	3,944.38

Dividend, July 1	$32,000.00	
Less earnings for 74 days— 74/365 of $34,859.84 .	7,067.47	
Remainder	$24,932.53	11,680.72
Dividend, October 15 . .	$16,000.00	
Less earnings for 93 days— 93/365 of $34,859.84 .	8,882.10	
Remainder	$ 7,117.90	1,521.09
Schedule 'D', as revised		$ 46,937.51

SCHEDULE I

Net income subject to excess profits tax	$ 34,859.84

SCHEDULE II

Schedule 'A'	$1,120,000.00
Schedule 'B'	10,926.23
Total	$1,130,926.23
Schedule 'C'	452,723.27
Remainder	$ 678,202.96

Schedule 'D'	46,937.51
Invested capital, as revised	$ 631,265.45

SCHEDULE III

7% of invested capital	$ 44,188.58
Specific exemption	3,000.00
Excess profits credit	$ 47,188.58

SCHEDULE IV

Excess profits tax	None

NORMAL TAX

Net income subject to tax at 2% and 4%	$ 34,859.84
Normal tax	$ 2,091.59
Tax paid	11,870.68
Refund due	$ 9,679.09

1918

Net income, per agent		$ 71,415.79
Deduct:		
1917 income included by agent	$ 460.00	
Depreciation of patent rights	54,121.42	
Officers salaries	5,250.00	59,831.42
Net income, as revised		$ 11,584.37

SCHEDULE 'E'

Total, per agent	$1,174,783.75
Deduct surplus	54,783.75
Schedule 'E', as revised	$1,120,000.00

SCHEDULE 'F'

Total, per agent	$ 12,210.14
1916 refund due	1,096.53
Total Schedule 'F', as revised	$ 13,306.67

SCHEDULE 'G'

Total, per agent			$1,127,259.41
Add liquidating dividends			259,234.03
Excess of patent rights over 25% of stock outstanding March 3, 1917, 25% of $1,120,000.00		$280,000.00	
Patent rights	$811,821.36		
Less depreciation	270,607.10	541,214.26	261,214.26
Total			$1,647,707.70
Deduct patent rights included by agent in error			811,821.36
SCHEDULE 'G', as revised			$ 835,886.34

SCHEDULE 'H'

	Amount	Earnings	Balance	Days Effective	
Revised 1917 tax	$ 2,091.59	$	$ 2,091.59	200	$ 1,146.08
Dividend, Jan. 15	32,000.00	444.33	31,555.67	351	30,345.31
Apr. 15	16,000.00	2,856.42	13,143.58	261	9,398.56
July 15	27,200.00	2,888.16	24,311.84	170	11,323.32
Oct. 15	16,000.00	2,919.90	13,080.10	78	2,795.20
Total Schedule 'H', as revised					$ 55,008.47

SCHEDULE I

Net income	$ 11,584.37

SCHEDULE II

Schedule 'E'	$1,120,000.00
Schedule 'F'	13,306.67
Total	$1,133,306.67
Schedule 'G'	835,886.34
Remainder	$ 297,420.33
Schedule 'H',	55,008.47
Invested capital, as revised	$ 242,411.86

SCHEDULE III

8% of invested capital	$ 19,392.95
Specific exemption	3,000,00
Excess profits credit	$ 22,392.95

SCHEDULE IV

Excess profits tax	None

INCOME TAX

Net income	$11,584.37	
Less exemption	2,000.00	
Taxable at 12%	$ 9,584.37	
Tax at 12%		$ 1,150.12
Tax paid		1,218.53
Refund due		$ 68.41

1919

Net income, per agent		$ 72,057.74
Deduct:		
Depreciation of patent rights	$54,121.44	
Salaries of officers	9,000.00	63,121.44
Net income, as revised		$ 8,936.30

SCHEDULE 'E'

Total, per agent	$1,120,000.00

SCHEDULE 'F'

Total, per agent		$ 23,934.39
Add:		
Refund due for 1916 income tax		1,096.53
Refund due for 1917 income tax		9,679.09
Total		$ 34,710.01
Deduct difference in reserve and liquidation dividends		10,448.89
Schedule 'F', as revised		$ 24,261.12

SCHEDULE 'G'

Total per agent			$1,129,304.80
Add:			
Liquidating dividends			315,498.16
Excess of patent rights over 25% of capital stock outstanding March 1, 1913, 25% of $1,120,000.00		$280,000.00	
Patent rights	$811,821.36		
Depreciation	324,728.52	487,092.84	207,092.84
Total			$1,651,895.80
Deduct patent rights included by agent in error			811,821.36
Schedule 'G', as revised			$ 840,074.44

SCHEDULE 'H'

		Adjusted Average
1918 revised income tax . .	$1,150.12	$ 486.04
Dividend, April 11	$8,000.00	
Less earnings for 100 days— 100/365 of $8,936.30 . . .	2,448.30	
Remainder	$5,551.70	4,030.68
Dividend, May 8	$8,000.00	
Less earnings for 27 days— 27/365 of $8,936.30 . . .	661.04	
Remainder	$7,338.96	4,785.40
Dividend, June 14	$8,000.00	
Less earnings for 37 days— 37/365 of $8,936.30 . . .	905.87	
Remainder	$7,094.13	3,906.64
Dividend, July 28	$8,000.00	
Less earnings for 44 days— 44/365 of $8,936.30 . . .	1,077.25	
Remainder	$6,922.75	2,977.73
Dividend, September 15 . .	$8,000.00	

Less earnings for 49 days—		
49/365 of $8,936.30 . . .	1,199.67	
Remainder	$6,800.33	2,012.15
Dividend, October 15 . . .	$8,000.00	
Less earnings for 30 days—		
30/365 of $8,936.30 . . .	734.49	
Remainder	$7,265.51	1,552.63
Dividend, November 15 . . .	$8,000.00	
Less earnings for 31 days—		
31/365 of $8,936.30 . . .	758.97	
Remainder	$7,241.03	932.41
Dividend, December 15 . . .	$8,000.00	
Less earnings for 30 days—		
30/365 of $8,936.30 . . .	734.49	
Remainder	$7,265.51	636.58
Total		$ 21,320.26

SCHEDULE 'A'

Net income	$ 8,936.30

SCHEDULE 'B'

Schedule 'E'	$1,120,000.00
Schedule 'F'	24,261.12
Total	$1,144,261.12
Schedule 'G'	840,074.44
Remainder	$ 304,186.68
Schedule 'H'	21,320.26
Invested capital, as revised	$ 282,866.42

SCHEDULE 'C'

8% of invested capital	$ 22,629.31
Specific exemption	3,000.00
Excess profits credit	$ 25,629.31

SCHEDULE 'D'

Excess profits tax	None

NORMAL TAX

Net income	$8,936.30	
Less exemption	2,000.00	
Amount taxable at 10%	$6,936.30	
Tax at 10%		$ 693.63
Tax paid		760.51
Refund due		$ 66.88

1920

Net income, per agent		$ 99,394.90
Deduct:		
Depreciation of patent rights	$54,121.44	
Salaries of officers	9,000.00	63,121.44
Net income, as revised		$ 36,273.46

SCHEDULE 'E'

Total, per agent	$1,120,760.51

SCHEDULE 'F'

Total, per agent	$ 16,648.23
Add:	
Refund of income tax for 1916	1,096.53
Refund of income tax for 1917	9,679.09
Refund of income tax for 1918	68.41
Total	$ 27,492.26
Deduct difference in reserve	2,126.39
Schedule 'F', as revised	$ 25,365.87

SCHEDULE 'G'

Total, per agent			$1,130,999.94
Add:			
Liquidating dividends			376,713.57
Excess of patent rights over 25% of capital stock outstanding March 3, 1917—25% of $1,120,000.00		$280,000.00	
Patent rights	$811,821.36		
Depreciation	378,849.96	432,971.40	152,971.40
Total			$1,659,684.91
Deduct patent rights included by agent in error			811,821.36
Schedule 'G', as revised			$ 847,863.55

SCHEDULE 'H'

		Adjusted Average
1919 income tax, as revised	$ 693.63	$ 292.30
Dividend, February 14.	4,000.00	
Less earnings for 44 days—44/365 of $36,273.46	4,372.69	
Remainder	.....	.....

Dividend, March 5		$4,000.00	
Less earnings for 64 days	$6,360.28		
Deduct dividend February 14 . . .	4,000.00	2,360.28	
Remainder		$1,639.72	$ 1,356.70
Dividend, April 10.		$4,000.00	
Less earnings for 36 days—36/365 of $36,273.46 . .		$3,577.66	
Remainder		$ 422.34	307.79
Dividend, May 10		$4,000.00	
Less earnings for 30 days—30/365 of $36,273.46 . .		2,981.38	
Remainder		$1,018.62	658.61
Dividend, June 15		$8,000.00	
Less earnings for 36 days—36/365 of $36,273.46 . . .		3,577.66	
Remainder		$4,422.34	2,423.20
Dividend, July 10		$8,000.00	

Less earnings for 25 days—		
25/365 of $36,273.46 . . .	2,484.48	
Remainder	$5,515.52	2,644.43
Dividend, August 2	$8,000.00	
Less earnings for 23 days—		
23/365 of $36,273.46 . . .	2,285.74	
Remainder	$5,714.26	2,379.64
Dividend, September 1 . . .	$8,000.00	
Less earnings for 30 days—		
30/365 of $36,273.46 . . .	2,981.38	
Remainder	$5,018.62	1,677.46
Dividend, October 1	$8,000.00	
Less earnings for 30 days—		
30/365 of $36,273.46 . . .	2,981.38	
Remainder	$5,018.62	1,264.97
Dividend, November 1 . . .	$8,000.00	

Less earnings for 31 days—		
31/365 of $36,273.46 . . .	3,080.76	
Remainder	$4,919.24	822.12
Dividend, December 1 . . .	$8,000.00	
Less earnings for 30 days—		
30/365 of $36,273.46 . . .	2,981.38	
Remainder	$5,018.62	426.24
Total Schedule 'H', as revised		$ 14,253.46

SCHEDULE 'A'

Net income as revised	$ 36,273.46

SCHEDULE 'B'

Schedule 'E'	$1,120,760.51
Schedule 'F'	25,365.87
Total	$1,146,126.38
Schedule 'G'	847,863.55
Remainder	$ 298,262.83
Schedule 'H'	14,253.46
Invested capital, as revised.	$ 284,009.37

SCHEDULE 'C'

8% of invested capital	$ 22,720.75
Specific exemption	3,000.00
Total	$ 25,720.75

SCHEDULE 'D'

EXCESS PROFITS TAX:

	Amount	Credit	Balance	Rate	Tax
Not over 20% of invested capital	$36,273.46	$25,720.75	$10,552.71	20%	$2,110.54

INCOME TAX:

Net income		$36,273.46
Less:		
Excess profits tax	$2,110.54	
Exemption . . .	2,000.00	4,110.54
Balance taxable at 10% . . .		$32,162.92
Tax at 10%		3,216.29
Total tax, tentative		$ 5,326.83

SCHEDULE 'H' (FINAL)

Taxable net income	$36,273.46
Less tentative tax	5,326.83
Balance of net earnings	$30,946.63

Average net earnings per diem $84.78528.

	Date		Amount	Earnings	Balance	Days effective	Amount
Dividend	Feb.	14	$4,000.00	$3,730.55	$ 269.45	322	$ 237.71
	Mar.	5	4,000.00	1,695.71	2,304.29	302	1,906.56
	Apr.	10	4,000.00	3,052.27	947.73	266	690.67
	May	10	4,000.00	2,543.56	1,456.44	236	941.70
	June	15	8,000.00	3,052.27	4,947.73	200	2,711.08
	July	10	8,000.00	2,119.63	5,880.37	175	2,819.36
	Aug.	2	8,000.00	1,950.06	6,049.94	152	2,519.43
	Sept.	1	8,000.00	2,543.56	5,456.44	122	1,823.80
	Oct.	1	8,000.00	2,543.56	5,456.44	92	1,375.32
	Nov.	1	8,000.00	2,628.34	5,371.66	61	897.73
	Dec.	1	8,000.00	2,543.56	5,456.44	31	463.42
1919 income tax			693.63			.4214	292.30

Total Schedule 'H', as revised $16,679.08

SCHEDULE 'B' (Final)

Schedule 'E'	$1,120,760.51
Schedule 'F'	25,365.87
Total	$1,146,126.38
Schedule 'G'	847,863.55
Remainder	$ 298,262.83
Schedule 'H'	16,679.08
Invested capital, as revised	$ 281,583.75

SCHEDULE 'C' (Final)

8% of invested capital	$ 22,526.70
Specific exemption	3,000.00
Excess profits credit	$ 25,526.70

SCHEDULE 'D' (Final)

EXCESS PROFITS TAX

	Amount	Credit	Balance	Rate	Tax
Not over 20%	$36,273.46	$25,526.70	$10,746.76	20%	$2,149.35

INCOME TAX

Net income	$36,273.46

Less:			
Excess profits tax	$2,149.35		
Exemption . . .	2,000.00	4,149.35	
Amount taxable at 10% . . .		$32,124.11	
Tax at 10%			$ 3,212.41
Total tax assessable			$ 5,361.76
Tax paid			5,730.59
Refund due			$ 368.83

SUMMARY OF TAX COMPUTATIONS

. . . . . TOTAL TAX . . . . .

Year	Per Agent	As revised	As paid	Refund due
1916	$ 1,656.04	$ 559.51	$ 1,656.04	$ 1,096.53
1917	52,160.66	2,091.59	11,870.68	9,679.09
1918	49,014.61	1,150.12	1,218.53	68.41
1919	28,806.56	693.63	760.51	66.88
1920	41,381.65	5,361.76	5,730.59	368.83
Total	$173,019.52	$9,856.61	$21,236.35	$11,279.74

"TRUMBLE REFINING COMPANY OF ARIZONA
916 HIGGINS BUILDING
LOS ANGELES, CALIFORNIA

JURAT

"A. J. Gutzler, being duly sworn, deposes and says that he is the secretary of the Trumble Refining Company of Arizona; that he has read the foregoing brief, and that the facts contained therein are true and correct to the best of his knowledge and belief.

A. J. GUTZLER

Signed and sworn to before me
this 30th day of January,
nineteen hundred and twenty-two.

PEARL TRALLE
Notary Public

(SEAL)"

(Testimony of E. P. Adams)

DIRECT EXAMINATION

resumed by Mr. Mackay:

The crux of the protest is that the Trumble Refining Company was claiming, or endeavoring to establish the March 1, 1913 value of its license agreements for the purpose of depreciation.

I am the Mr. E. P. Adams referred to in the letter attached as Exhibit "M" of Plaintiffs' "Exhibit 1". I was in Washington, D. C. on December 9, 1922 in connection with the case of the Trumble Refining Company for the year 1917, and other cases. The Trumble case involved the years 1917, 1918, 1919, 1920. I don't recall the man's name with whom I had a conference. He was in charge of the Special Audit Section. The Special Audit Section was a section of the Bureau of Internal Revenue. I had a discussion with him in respect to the determination of the tax liability for the year 1917, and also the other years.

I told the head of the Special Audit Section that I would like to then take up all the years 1917 to 1920. He said they had not reached the point of reviewing the Revenue Agent's report and our protest and that at that time it could not be taken up.

I asked him, "Well, how about 1917? Will you hold that and take them all up together?"

He said, "Yes. When you go back send me a waiver", which I did when I returned to Los Angeles.

(Testimony of E. P. Adams)

I prepared the telegram attached as Exhibit "N" to Plaintiffs' "Exhibit 1" for the Trumble Refining Company and in this telegram was referring to the informal conference on December 9, 1922.

I am and was familiar with Exhibit "O", which is attached to the Stipulation, "Exhibit 1". That is a telegram from the Commissioner of Internal Revenue to the Trumble Refining Company dated May 21, 1923. Pursuant to that telegram, I prepared a formal protest and filed it with the Commissioner of Internal Revenue at Washington, D. C.

The document handed me dated April 29, 1924, is a copy of the original protest filed at that time. After this protest and brief was presented to the Commissioner of Internal Revenue I had a conference with respect to the years 1917, 1918, 1919 and 1920, and particularly with reference to the issue as to whether or not the Trumble Refining Company was entitled to depreciation on its license agreements.

The conference took place about a week after the protest was dated. I prepared the protest and took it back to Washington with me at that time. I think it would be about May 7 or 8 in 1924. I made an oral presentation besides and was at that time demanding that the Commissioner allow the Trumble Refining Company deductions for depreciation on its license agreements for all years. At that time the Commissioner's representatives had the complete file before them.

(Testimony of E. P. Adams)

EXAMINATION BY THE COURT

At the time of my conference in Washington during December, 1922 with one of the agents from the office of the Commissioner, I brought up the subject matter and asked to have considered the claims on behalf of the taxpayer for an allowance of depreciation on license agreements for the year 1917, as well as subsequent years to 1920. At this conference the Agent in the Commissioner's office did not say in words or in substance that the Commissioner's office would not give consideration to this claim so far as it concerned the year 1917 because it was too late to bring the matter up, or for any other reason.

I had another conference with an Agent in the office of the Commissioner early in May, 1924.

"THE COURT: Well, may I interrupt here and ask, during this conference that you had some time in May of 1924 with an agent from the office of the Commissioner of Internal Revenue, was there exhibited, or any reference there made, to the protest that you had prepared and caused to be submitted in February, 1922?

THE WITNESS: Yes, sir. That protest and the revenue agent's report were in the hands of the Member that I was conferring with."

In the course of this conference the claim for refund insofar as it concerned the year 1917 came up and was discussed with the Commissioner's representative. It had come up—I don't remember exactly on it—it naturally would, with the whole file there for all the years. At this

conference the Commissioner's representative did not say in words or substance that no discussion would be had, or no consideration given to a claim on the part of the taxpayer for a refund covering the year 1917 on account of and by way of depreciation on the license agreements. The general subject matter of my conference with the Commissioner's representative in May, 1924 had to do with the claim for refund of depreciation on these license agreements. I have no notes on that conference.

The additional tax covered in the protest filed about February 1, 1922 pertained to the years 1917, 1918, 1919 and 1920.

In the conference I had with the Commissioner's representative in May, 1924, so far as it pertained to the business of this taxpayer, I talked in general about valuation of those agreements. That was the main issue and until that was determined, the matter of tax could not be settled, one way or another. Yes, the valuation of those agreements as of March 1, 1913 to determine depreciation was discussed. The conversation in this conference of May, 1924, so far as it dealt with the valuation of license agreements was not confined to the tax for any one year. It would include 1917 to 1920 after the determination of the value. I don't think this conference included any discussion with reference to any tax already assessed or paid

for those years. I don't recall it because, as I say, we were confining ourselves to trying to arrive at a value, I had the president of the company along with me as a witness to go into that angle of it and we spent all morning on that.

I was in Washington attempting to establish a value for those patent license agreements because that was the crux of the whole case of the Trumble Refining Company—the value of those patents and invested capital. In the claim for refund for 1917 we had set up and claimed depreciation on those license agreements. The Agent in his report had disallowed, and my protest of February, 1922 set forth in detail how we acquired those patents and license agreements, what they had cost us and what the market value as of March 1, 1913 was according to the books and the company's own estimated value—something like two and one-half million dollars is what they showed. Then, supported with that was a detailed schedule showing the taxes by years for the years 1916 to 1920, inclusive, taking depreciation on the patents. That showed a refund due in each year for 1916 to 1920, inclusive, so all of those conferences—all of my trips to Washington were on the idea of getting our money for 1917—getting our money for every year. To do that it was necessary to establish the value to the Government's satisfaction in March, 1913, so consequently that was what we were discussing in all of these conferences.

A copy of the protest filed by Mr. Adams in May, 1924 (about May 2nd) was then introduced in evidence as Plaintiffs' Exhibit 4:

PLAINTIFFS' EXHIBIT 4

"TRUMBLE REFINING COMPANY OF ARIZONA
804 HIGGINS BUILDING
LOS ANGELES, CALIFORNIA

"April 29, 1924

"Hon. Charles D. Hamel,
Chairman, Committee on Appeals and Review,
Washington, D. C.

Sir:

"Reference is made to correspondence in connection with the appeal pending before your committee in connection with the proposed assessment of additional income and profits taxes for the year 1918.

"We are submitting herewith a brief setting forth in summary the facts regarding the points at issue with the Income Tax Unit and the contentions of the taxpayer relative thereto.

Respectfully,

TRUMBLE REFINING COMPANY OF ARIZONA

By F. M. TOWNSEND
President.

"TRUMBLE REFINING COMPANY OF ARIZONA
804 HIGGINS BUILDING
LOS ANGELES, CALIFORNIA

"Brief presenting protest of this taxpayer to the decisions of the Income Tax Unit on which the assessment of additional income and profits taxes has been made for the year 1917 and is proposed for 1918 and subsequent years.

"OUTLINE OF BRIEF

"This taxpayer has entered an appeal to the Committee on Appeals and Review from the contentions of the Income Tax Unit set forth in memorandum dated January 14, 1924 as follows:

1. That this taxpayer on April 2, 1915 disposed of all rights held under United States Letter Patent 996,736 and 1,002,474.

2. That the taxpayer having retained nothing of its patents, any deductions for depreciation based on such patents should be disallowed.

3. That the minimum value of such patent rights at March 1, 1913 cannot be determined on the basis of the data submitted by the taxpayer.

"STATEMENT OF FACTS, CONTENTIONS AND CONCLUSIONS

"1. Patent rights held by the taxpayer subsequent to April 2, 1915 and depreciation thereof.

"In connection with this point the Unit's position is stated in the memorandum as follows:

" 'Facts:

All the patents were sold in April, 1915, for one million dollars, the company retaining some seventeen royalty contracts made at various dates, from January, 1911 to July, 1913, based upon these patents sold. The alleged value of these contracts was set up by deducting the one million received from the sale of patents from the alleged March 1, 1913 value of patents and patent right. It is this latter sum which taxpayer now claims is depreciable.'

" 'Unit's Contentions:

The Unit cannot concede the contention of the taxpayer, either as to the March 1, 1913 value of the patents or the contention that royalty rights, such as are present in the taxpayer's case, are depreciable.'

"The position of the Unit as set forth in the above it is contended is not in accord with the facts, logic, or the law, and in support of this contention we submit the following summarized statement:

"In this matter we must consider the class of property in which the Trumble Refining Company had its total investment.

"Patents on inventions are classed as property by courts and by text writers on the subject. Walker on Patents, one of the most often quoted and relied upon by the

United States Courts states in Sec. 151 to 153 in the 5th Edition of that book:

" 'Patent rights are property, and the very essence of the rights conferred by the patent is the exclusion of others from its use. The owner of a patent is both legally and equitably entitled to the same protection for that property, that the owner of any other species of property may enjoy, and he cannot be constitutionally deprived of that property without due process of law.'

"In Section 152 we find:

" 'The right of property which an inventor has in his invention, is excelled, in point of dignity, by no other property right whatever. It is equalled in point of dignity, only by the rights which authors have in their copyrighted books. The inventor is not the pampered favorite or beneficiary of the government, or of the nation. The benefits which he confers, are greater than those which he receives. . . . He walks everywhere erect and scatters abroad the knowledge which he created. He confers upon mankind a new means of lessening toil, or of increasing comfort, and what he gives cannot be destroyed by use, nor lost by misfortune. It is henceforth an indestructible heritage of posterity. On the one hand, he receives from the government nothing which cost the government or the people a dollar or a sacrifice.

" 'He receives nothing but a contract, which provides, that for a limited time he may exclusively enjoy his own. Compared with those who acquire property by devise or inheritance: compared with those who acquire by gifts or marriage: compared with those who acquire property by profit on sales, or by interest on money: The man

who acquires property in inventions, by creating, things unknown before, occupies a position of superior dignity.'

"In Section 153, we read:

" 'Letters Patent are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as public franchises granted to inventors of new and useful improvements, for the purpose of securing to them, as inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use and vend to others to be used, their own inventions, as tending to promote the progress of science and the useful arts, and as a matter of compensation to the inventors for their labor, toil and expense in making the inventions, and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of Congress.

" 'Such is the accepted doctrine as formulated by Justice Clifford when speaking for the Supreme Court. The same ideas were more concisely expressed in an earlier case by Justice Daniel. . . .' (Walker on Patents, 5th Ed., pages 184 to 190.)

"The granting of a patent to the inventor is an acknowledgment by the government that a valuable addition to the arts and sciences has been bestowed upon the world at large by him and in fulfillment of the promise made to him for such bestowal, he shall have the full and complete control over its use or employment for the limited period named in order that he may be repaid or compensated for the labor, toil and expense in making the invention.

"The amount of such compensation must be acceptable to him, or otherwise he may not part with his dominion over the entire enjoyment. When he has set his valuation upon the right to use or employ the invention, there is no one with power or authority to gainsay or alter the price or terms. His right to the full control is paramount, and no appeal can be made therefrom except in a case of eminent domain arising as between him and the government.

"He may exchange or confer the full right or any portion thereof upon others as he may see fit and accept in payment therefore whatsoever he may. The thing or consideration may be in cash money or that which represents a cash valuation to him, but no matter what it may be that he receives, it is to him a compensation for his labor, toil and expense in making the invention. If he demands and receives one million dollars in a stock representing to him a value of one million dollars it must not be said that he had not demanded and been paid that amount because another person without knowledge of the true intrinsic value of the thing represented by the stock would not have purchased the same for cash for the amount of one million dollars.

"The government contract with the inventor (Letters Patent) witnesses the fact that a return is due the inventor to repay him for the bestowal of his knowledge gained through toil, labor and expense.

"In the proof required by the government from the inventor he must set the metes and bounds of his property, to establish the extent to which his rights are limited. Within such boundaries no one may trespass without his consent. He may admit one or many; he may deny one or all; he may limit their stay within his property

for a day or for the full term for which his contract with the government may inure.

"Whatsoever he possesses as his patent he may enjoy by himself or with others upon whatsoever terms or conditions he may impose or exact, but his supreme control ceases upon the expiration of the Letters patent (the contract with the government).

"He may part with the legal title to the property, but retain unimpaired, any particular part of the benefits to any certain right governed or existing by or through the execution of the contract, (Letters Patent) by the government, and such residue remaining or part so retained is a part of the whole so granted by the government, undivisable and unseparable therefrom; running with and exhausting with the term of the contract which is the sole basis upon which the entire structure is founded.

"The Trumble Refining Company before April 2, 1915, was the sole owner of the Trumble patents, having paid to the former owners the full purchase price demanded by them as compensation for the labor, toil and expense in making the inventions. Being then the full owner of the patents, the Trumble Company was endowed with full right to the enjoyment of such rights in any manner it saw fit. In exercising such rights it saw fit to delegate to others the right to use and employ a portion of its property duly described and identified by written instruments. The boundaries within which such parties were authorized to participate were established, and the term or terms of such enjoyment were determined, all subject to the fulfillment of the obligations imposed by the Trumble Company.

"The entire ownership of the patents by the Trumble Company was not, nor could not be disputed at that time.

"On April 2, 1915, it was agreed by and between the Trumble Refining Company and one W. Meischke-Smith that reserving to the Company that portion of the property within the patent rights already occupied by the company as evidenced by the licenses named as Schedule 'B' that the residue or remainder should pass to Mr. Meischke Smith for a cash consideration.

"The purchase agreement sets forth four outstanding facts as follows:

"First: W. Meischke Smith excluding the license agreements named in Schedule 'B' was desirous of purchasing the patents and inventions of the company together with all fututre inventions of M. J. Trumble which thereafter might become the property of the company.

"It is to be noted that no desire to purchase the rights covered by licenses of Schedule 'B' was present.

"Second: The company accepting the property covered by licenses named in Schedule 'B' sold the property named in Schedule 'A'.

"It is to be noted that the company by excepting the property in schedule 'B' remained in full and undisturbed possession thereof. No change or alteration of the relations existing before the sale took place between the parties to these licenses because of such sale. The full purpose for which the instruments were executed remained unchanged; the obligations upon both sides remained the same; the user under the patent rights was bound under the terms thereof to pay tribute to the owner of the patent rights as set forth in the instrument. He was not obligated to pay tribute to one who was not the owner of the patent rights so enjoyed by him. If the company did not retain its ownership in and to the patent rights to the

extent defined, then the licensed user was free of his obligations to pay it tribute. The buyer, W. Meischke Smith, was without power to compel payment of tribute for the reason he never purchased, acquired or possessed such rights.

"Third: The consideration moving the company to part with the legal title to the patents was the payment of one million dollars and the retention undisturbed of all rights inclusive with the licenses named in schedule 'B'. Without this full consideration the transaction would not have been consummated. It required both considerations to satisfy the demands of the company.

"Fourth: A further consideration moving from the purchaser to the company was the guarantee by the purchaser to in every way respect the full rights reserved; to refrain in all ways from interfering with the users so licensed by the company by attempting to acquire the rights granted them and if he should have acquired by purchase any of the property so leased by the company, he was obligated to pay to the company the tribute as specified in the license as existing by and between the company and the user.

"This fact alone undisputably shows that the purchaser never questioned the fact that that portion of the patent property was still the property of the company and in no way affected by his purchase of the residue remaining with the passing of the legal title; otherwise it would not have been within reason for him to pay tribute to the company for the use of a patented device of which he himself was the owner.

"If further light is desired as to the intent and purpose surrounding the purchase from the Trumble Company, we find that a specific assignment and transfer of

three licenses granted by the company and not included in schedule 'B' were made to Meischke Smith. This proves that the entire rights were not conveyed by the assignment, as a part of the rights were occupied at the time and recognized as being so appropriated, thereby leaving a residue to be transferred, which constituted the right sold by the company and not all rights that go to make up the full and complete enjoyment of the invention as granted by the issuance of a patent.

"If the purpose of the purchase and sale affected by and between the company and W. Meischke Smith was to vest in Meischke Smith all rights and powers of complete ownership, the procedure would have been to assign him all, and for him to have granted a license to the company covering the rights covered by licenses according to schedule 'B' in which event the rights so covered would have originated in him. As it stood he had no part in those rights at any time.

"The sale to Meischke Smith in no way affected the ownership of the patent rights by the company and it has never been within the power of Meischke Smith to change, alter or control in any way the patent rights as licensed to the users named in schedule 'B'.

"It goes without saying that there was a certain portion within the boundaries of the patent property which he, Meischke Smith, never purchased, became possessed of or occupied, and which he had specifically disclaimed and agreed he would not trespass thereupon.

"If the purchaser does not own that portion of the patent rights, the Trumble Refining Company does, and that right runs with the patent grant exactly in accordance with the contract of the patent.

"The owner of a patent, like the owner of any other property, may deal with it as he sees fit. He may sell undivided interests to any number of persons in any sizes that he likes, he may license temporarily or permanently. He may assign the whole legal title and reserve the entire beneficial interest to himself, or any part thereof, or he may reserve a license to the use thereof after disposing of the whole legal title. All these transactions would be perfectly legal and valid, and whenever such a situation occurs, it is obvious that the whole interest of the patentee has not passed, and it is absolutely immaterial what the right, interest or estate retained may be called.

"The situation is precisely analagous to the case of a man selling real estate. He may sell the whole of it or he may sell any number of undivided interests. He may transfer the legal title, reserving mineral rights; he may transfer the legal title reserving rights of way, or he may transfer the legal title entirely reserving, however, the entire beneficial interest as where he directs that the income be reserved to him for his lifetime.

"In this case, as well as in the case of the patent, unless the whole legal title and the whole beneficial interest passes to the purchaser, there remains something in the vendor that has not been sold, and this situation is constantly taken advantage of by the government in determining profits on sales.

"From the foregoing we respectfully must contend that the Trumble Refining Company was the owner at all times, subsequent to acquirement in 1910 of the patent applications and the issuance of Letters Patent in 1911, of all patent rights appertaining to the use of which was licensed under the royalty contracts shown in 'Exhibit 'A'.

"It is further contended that the Income Tax Unit is in error in the following statement appearing in the memorandum:

" 'The taxpayer's case is not analogous to that cited in A. R. M. 35, as, in this case under consideration, taxpayer retains no interest in the earnings from assigned patents.'

"A. R. M. 35 reads as follows:

" 'A invented certain apparatus and secured United States Patents thereon. The patents were assigned to a foreign corporation under an agreement by which he retained 40 per cent interest in profits therefrom. Legal title to the patents passed to the company subject to the agreement mentioned. A's interest was recognized by the company and by the United States licensees under the patents. The Committee is of the opinion that the agreement should be recognized as giving A a depreciable interest in the patents.

" 'The value of each patent as of March 1, 1913 should be segregated and the depreciation allowable thereon determined on the basis of its own life instead of using as a basis the average life of all the patents in bulk. Of the total depreciation allowable for any year, sixty per cent is deductible in the return of the company and forty per cent in A's return.'

"In the case referred to title to the Letters Patent passed to an outside party for a consideration including among other things a reservation of forty per cent of the future royalties to accrue from licensing the use of the patents.

"In the case of the Trumble Refining Company title to the Letters Patent was passed for a consideration of

$1,000,000.00 cash and the reservation to the Trumble Refining Company of all interest in the patents applying to eighteen royalty contracts then in effect. The latter was recognized by both parties as of equal weight in the final negotiations as shown by the affidavit of F. M. Townsend, A J. Gutzler and M. J. Trumble attached hereto as Exhibit 'A', and particularly reference to the following statement is hereby made:

" 'That after several days further negotiations the said Smith referred the matter to the London office of his company, and in a few days was advised to offer the Trumble Refining Company the sum of one million dollars for its total business, including patent rights in all countries of the world and the assignment of all license agreements then in force with other companies.

" 'That the said deponents declined this proposal, explaining that the business already developed was worth more than the money offered as royalties for the previous year were nearly seven per cent on a million dollars.'

"In the light of these facts we must of necessity conclude that the Unit's position is not in accord with that of the Committee as already set forth in A. R. M. 35 previously quoted.

"It is accordingly requested that the decision of the Unit that the Trumble Refining Company retained nothing of its patent rights after April 2, 1915 be reversed.

"2. Depreciation of patent rights.

"The Unit through its contention as set forth under No. 1, has held that the Trumble Refining Company is not entitled to any depreciation deductions claimed for patent rights or any part of such rights. This contention on the part of the Unit is clearly not in accord with the

decision of the Committee as set forth in A. R. M. 35 previously referred to and quoted. It is accordingly respectfully requested that the decision of the Unit on this point be reversed.

"3. Valuation of patent rights as a basis for depreciation.

"The Unit in conference and in summary in its memorandum made the following contentions:

"1. That basis of valuation of the retained rights was erroneous in that such rights were not a part of the patents.

"2. That in determining the value of the patent rights at March 1, 1913 royalties earned for the four to five years prior to date of valuation were required and future earnings could not be considered.

"3. That the value determined as of the basic date would have to be segregated as between the two patents.

"These contentions by the Unit we submit are not in accord with the law and the interpretation thereof as promulgated by the Commissioner through the regulations and rulings issued thereunder, and we submit hereunder the facts, arguments and conclusions of this taxpayer in connection therewith.

"1. Royalty rights not a part of patents.

"This point was covered in detail in Section 1 of this brief and it is not deemed necessary to discuss further at this point to show the fallaceousness of the Unit's position.

"2. Basis of valuation of patents as of March 1, 1913.

"The Unit in support of its contention refers to A. R. R. 34 in which is outlined a method of determining the value of intangibles and wherein it is stated 'allow out of

average earnings over a period of years prior to March 1, 1913, preferably not less than five years, a return etc.' The representative of the taxpayer called attention to the fact that such a period was not to be considered mandatory, but was named in a restrictive sense only where operations extended over a long period. That this is the sense in which used by the Committee is shown by reference to A. R. R. 252 where a period of 3-1/3 years was used and A. R. R. 799 where two years were used. It was further pointed out to the Unit that such basis of the use of prior earnings only was advanced in cases of manufacturing companies where the logical conclusion was that any increase would be as a result of future sales and distribution endeavor, whereas in the case of this company the increase in royalties to be secured over past periods was already contracted for and the principal plants nearing completion at the basic date and in fact were producing revenue in June of 1913 and August, respectively. The Unit representatives insisted that the future earnings had not been considered and that such a precedent would have to be from the Committee. This in spite of A. R. R. 2991 issued just prior to the conference, and 1086 in which it is stated:

" 'The Committee has repeatedly held that earnings subsequent to a basic date, unsupported by other evidence, cannot be accepted as a basis of valuation as of the basic date.'

"There are submitted herewith as Exhibits 'B' and 'C' statements showing the royalties earned by this company and the contracts held as of March 1, 1913 also the present worth as of March 1, 1913 of the estimated royalties under the contracts in effect at that date. From these exhibits it will be seen that the royalties for the year 1912 and for the months of January and February, 1913 were

in excess of $2,500.00 per month, whereas for the period March 1 to December 31, 1913 averaged $5,480.00 per month. That the increase in excess of one hundred per cent was due to plants nearing completion at March 1, 1913 is readily seen. Under the contract with the Esperanza Consolidated Oil Company dated April 12, 1911 (sub-contracts No. 16 and No. 17) plants were under construction at Vernon and Mojave, California, such plants having a capacity of 20,000 and 10,000 barrels daily, respectively. (See Exhibit 'E'.) The royalties actually received from these plants were as follows:

Vernon—June to December, 1913	$21,142.31
Mojave—August to December, 1913	14,826.15

"The plant at Warner, N. J. under contract (No. 11) with the Warner-Quinlan Asphaltum Company, commenced in November, 1912 completed in July, 1913, earned royalties of $1,526.06 for the period August to December, 1913.

"From the foregoing it must be admitted that the royalties earned prior to March 1, 1913 could not be logically used as determinative of the value of the patents.

"From Exhibit 'B' it will be noted that the contracts in effect as of the basic date with plants in operation or under construction would show (based on seventy-five per cent efficiency of capacity operation for new plants and average for prior period on old plants, a present worth of royalties to be received over the life of the patents of $1,361,527.83. This basis it is contended would be accepted in the negotiations between a willing seller and buyer, each having full knowledge of the facts.

"A comparison of Exhibits 'B' and 'C' shows the following:

Contract No.	Licensee	Estimated Royalties 3/1/13—12/31/23	Actual Royalties 3/1/13—12/31/23
3	John R. Ott Contracting Co.	$ 29,656.25	$ 178.97
4	General Petroleum Corporation	4,500.00	1,460.47
6	General Petroleum Corporation	6,000.00	1,256.14
7	General Petroleum Corporation	14,828.12	4,898.61
9	General Petroleum Corporation	29,656.25	2,768.81
10	Santa Maria Oil Fields Company of California	79,083.33	14,272.49
11	Warner-Quinlan Asphaltum Co.	67,068.75	25,137.34
12	Pacific Crude Oil Company	127,461.00	.....
13	American Union Oil and Refining Company	49,427.01	292.60
16	General Petroleum Corporation	862,312.50	903,258.84
17	General Petroleum Corporation	431,156.25	145,462.13
		$1,701,149.46	$1,098,986.40

"In connection with the above, the following facts should be considered:

"Contracts No. 3 and No. 10. During the year 1913 the Jno. R. Ott Contracting Company was purchased by the Santa Maria Oil Fields Company of California and subsequent thereto the plant of the former at Los Angeles was used as a heating and distribution plant, and the manufacture of road oils was transferred to the Santa Maria plant at Cat Canyon.

"With the outbreaking of the World War in August, 1914 the demand for oil for road construction purposes fell off to a large extent, which condition caused the Santa Maria Company to curtail its drilling program as well as the manufacture of the oils for which the Trumble apparatus was used. This situation continued until the year 1922 when the condition was somewhat relieved and active operations gotten under way in 1923.

"Contracts No. 4, No. 6 and No. 7. These were all dehydrating plants installed under the contract of April, 1911 with the Esperanza Consolidated Oil Company (individual sub-contracts being made under the numbers shown). Due to the decline in production on these leases and the high costs for fuel in operating the plants the operations under these sub-contracts were curtailed to a large degree.

"Contract No. 9. This plant was operated until January, 1914, at which time the oil was turned into the pipe line to the Vernon Plant and the Kerto plant used as an asphaltum experimental station and entirely discontinued in that year.

"Contract No. 11. Due to war conditions the demand for road oils was to a large extent curtailed and in July, 1921 the plant was entirely destroyed by fire.

"Contract No. 12. After completion of its plant the Pacific Crude Oil Company accepted a proposal made by the Standard Oil Company for all of its production, the price offered being, we were informed, such as to preclude the operation by the company of its plant.

"Contract No. 13. Owing to financial difficulties the Licensee was unable to continue the operation of its properties.

"Contract No. 16. By reason of the decidedly low price of oil during the years 1914 and 1915 the Vernon Plant operations as well as production was curtailed.

"Contract No. 17. The operation of the Mojave Plant was discontinued in September, 1914. Due to the depression in the oil market and the increase in freight rates on gasoline, it was found prohibitive to distill at this interior point, and accordingly arrangements were made with the Santa Fe Railway for the delivery of heavy oils to them from the Midway and fuel oil from Los Angeles, and thereby enable the General Petroleum Company to discontinue the Mojave Plant. In 1918 a plant under this sub-contract was erected on the main pipe line to Los Angeles at Lebec.

"From the foregoing comparison it will be seen that for the period March 1, 1913 to December 31, 1923 the royalties received from the contracts in force on the basic date amounted to $1,098,986.40 as against the estimated

$1,701,149.46 and that such difference is attributable to conditions that would not be considered by either buyer or seller in the determination of a fair price to be received and paid for the patents.

"It is to be further noted that of the plants in operation at March 1, 1913 and the plants nearing completion six representing annual royalties on a conservative basis of $128,993.75 were owned by the Esperanza Consolidated Oil Company and that under the contract of April 12, 1911 the licensee was obligated to use the Trumble process exclusively in its operations and in addition to do all things to further the interests of the Trumble Refining Company and that for the period March 1, 1913 to December 31, 1923, in spite of the unusual conditions existing due to the World War these six contracts earned royalties of $1,059,105.00 as against estimated of $1,348,453.12.

"In view of all the surrounding facts as set forth in the foregoing, it is respectfully urged that the minimum value that can be ascribed to the patents as of March 1, 1913 is the present worth of the royalties shown in Exhibit 'B', $1,361,527.83, reduced by the administrative and operating expenses for the term of such patents.

"There is submitted herewith as Exhibit 'D' a statement showing the operating expenses of the Trumble Refining Company for the period September 21, 1910 to De-

cember 31, 1923 also estimated expenses per annum from March 1, 1913 on the basis of the business already developed at that date.

"From Exhibit 'D' it will be seen that the estimated expenses, including depreciation, per annum was $20,350.00 which amount for the remaining life of the patents (15-10/12 years) reduced to a present worth on an eight per cent basis amounts to $218,904.05, leaving a net minimum value of the patents of $1,129,549.07 ($1,348,453.12 less $218,904.05).

"This it is contended is the minimum value that could be assigned to the patents on March 1, 1913 and that such value could be applied only to the patents as then licensed and does not include any provision whatsoever for future licenses to be secured thereunder.

"3. Segregation of value.

"The representatives of the Income Tax Unit advanced the contention that even though a depreciable value were established for the patents, it would be required that such value be divided as between the two patents and cited A. R. N. 35 as authority for such contention. The representative of the taxpayer insisted that such segregation was required where many patents of varying expirations were involved and not in cases similar to that of this company, where only two patents closely allied as to use and expiration were involved. This position taken by the taxpayer's representative is believed to be logical and in accord with the intent of the Committee, and it is requested that the Unit's decision on this point be reversed.

"EXHIBIT 'A'

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

"F. M. Townsend, A. J. Gutzler, and M. J. Trumble first duly sworn, depose and say:

"That at all times from July 10, 1910 they have been managing officers or directors of the Trumble Refining Company of Arizona.

"That during the years 1913, 1914 and the early part of the year 1915 the said deponents were in negotiation with representatives of the Royal Dutch Shell Company.

"That the said negotiations were for the most part looking to the use of the Trumble apparatus and process by said company on a royalty basis.

"That in December, 1914 the said F. M. Townsend and A. J. Gutzler met with Mr. W. Meischke Smith (the representative of the said Royal Dutch Shell Company) for the purpose of entering into an agreement which would more closely bind the interests of the Trumble Refining Company and the Royal Dutch Shell Company.

"That at this conference Mr. Smith, after considerable discussion of the purchase and royalty basis, stated that his company would prefer not to operate on a stated royalty, but would prefer an arrangement whereby they could use the apparatus and process at will in the refineries operated by them.

"That after further discussion Mr. Smith stated he would take the matter up further with the London office of his company and arrange to come to Los Angeles in February, 1915.

"That Mr. Smith arrived in Los Angeles about the fifteenth of March, 1915 and negotiations were re-opened along the lines had in San Francisco, he insisting that the Trumble Refining Company make a flat price for the unlimited use by the Royal Dutch Shell Company of the apparatus and process in any of the countries in which said company operated; that said deponents made such a proposal for $1,000,000.00.

"That after several days further negotiations the said Smith referred the matter to the London office of his company, and in a few days was advised to offer the Trumble Refining Company the sum of one million dollars for its total business, including patent rights in all countries of the world and the assignment of all license agreements then in force with other companies.

"That the said deponents declined this proposal, explaining that the business already developed was worth more than the money offered, as royalties for the previous year were nearly seven per cent on a million dollars. Mr. Smith was much surprised and said 'If you people really earned that much money, I do not blame you for not wanting to sell at that price.' He was shown that the Trumble Refining Company had earned in the previous year approximately $69,000.00.

"That with the Shell Company plants to be in operation very shortly, these deponents could foresee that the earnings from these plants would on a royalty basis earn approximately $150,000.00 per annum, and with this in mind the said deponents made a proposal to sell the Shell Company the patents, with the exception of those appertaining to the license agreements then in force with the other companies, and to release the Shell Company from its license agreements covering its Martinez, Island of Trinidad and Thames Haven Plants.

"That the offer of said deponents was referred by cable to the London Office and was accepted.

"That these deponents would not have consented to this sale, and, from their personal knowledge, state that the required two-thirds of the stockholders of the Trumble Refining Company would not have consented to the sale of the patent rights, without the reservation continuing the ownership of the rights under the licenses issued.

F. M. TOWNSEND
A. J. GUTZLER
M. J. TRUMBLE

Subscribed and sworn to before me this 28th day of April, 1924.

(SEAL) PEARL TRALLE

Notary Public in and for the County of Los Angeles, State of California.

"EXHIBIT B-1

TRUMBLE REFINING CODMPANY OF ARIZONA

CONTRACTS HELD AS OF MARCH 1, 1913, AND PRESENT WORTH OF ROYALTIES AS OF THAT DATE

	CONTRACT NUMBER										
	3	4	6	7	9	10	11	12	13	16	17
Licensee	Jno. R. Ott Contracting Company	General Petroleum Corporation	General Petroleum Corporation	General Petroleum Corporation	General Petroleum Corporation	Santa Maria Oil Fields of Cal.	Warner-Quinlan Asphaltum Co.	Pacific Crude Oil Company	American Union Oil & Refining Co.	General Petroleum Corporation	General Petroleum Corporation
Date of license	Feb. 15, 1912	Apr. 12, 1911	Apr. 12, 1911	Apr. 12, 1911	Apr. 12, 1911	Sept. 28, 1912	Oct. 26, 1912	Nov. 30, 1912	Jan. 8, 1913	Apr. 12, 1911	Apr. 12, 1911
Patents licensed	996,736 1,002,474	996,736	996,736	996,736	996,736 1,002,474	996,736	996,736 1,002,474	996,736	996,736 1,002,474	996,736 1,002,474	996,736 1,002,474
Plant location	Los Angeles	Sibyl lease	Nevada-Midway	Olinda Delaware Union	Kerto ~~Aug. 1912~~	Cat Canyon	Warner N. J.	Fellows	Tulare	Vernon	Mojave
Plant erected	Nov. 1911	July 1912	July 1912	Sept. 1912	Aug. 1912	Dec. 1912	Nov. 1912-June 1913	Dec. 1912-Mar. 1913	Feb. 1913	May 15, 1913	July 1913
Plant capacity in bbls per annum	365,000	182,500	365,000	273,750	365,000	730,000	730,000	1,825,000	365,000	7,300,000	3,650,000
Estimated oil run per annum	54,750	50,000	120,000	136,875	182,500	365,000	365,000	941,250	182,500	5,475,000	2,737,500
Royalty per barrel	5¢	1¢	1¢	1¢	1-½¢	2¢	1-¾¢	1-¼¢	2-½¢	1-½¢	1-¼¢
Estimated royalty per annum	$ 2,737.50	$ 500.00	$ 1,200.00	$ 1,368.75	$ 2,737.50	$ 7,300.00	$ 6,387.50	$ 11,765.63	$ 4,562.50	$ 82,125.00	$ 41,062.50
Life of license, in years from March 1, 1913	15-1/2	10	5	15-1/3	15-1/2	15-1/3	15-1/2	15-1/3	15-1/2	15-1/2	15-1/2
PRESENT WORTH OF ROYALTIES ON 8% BASIS:											
1913	$ 2,566.41	$ 468.75	$ 1,125.00	$ 1,283.20	$ 1,710.94	$ 6,843.75	$ 2,994.14	$ 8,272.90	$ 2,138.67	$ 38,496.09	$ 19,248.05
1914	2,376.30	434.03	1,041.67	1,188.15	1,584.20	6,336.81	5,544.70	10,213.22	3,960.50	71,289.06	35,644.53
1915	2,200.28	401.88	964.51	1,100.14	1,466.85	5,867.41	5,133.99	9,456.69	3,667.13	66,008.39	33,004.19
1916	2,037.30	372.11	893.06	1,018.65	1,358.20	5,432.79	4,753.69	8,756.19	3,395.49	61,118.87	30,559.44
1917	1,886.38	344.55	697.70	943.19	1,257.59	5,030.36	4,401.56	8,107.58	3,143.97	56,591.54	28,295.77
1918	1,746.65	319.02		873.33	1,164.43	4,657.74	4,075.52	7,507.02	2,911.09	52,399.57	26,199.78
1919	1,617.27	295.39		808.64	1,078.18	4,312.72	3,773.63	6,950.94	2,695.45	48,518.11	24,259.06
1920	1,497.47	273.51		748.74	998.31	3,993.26	3,494.10	6,436.06	2,495.79	44,924.17	22,462.09
1921	1,386.55	253.25		693.27	924.37	3,697.46	3,235.28	5,959.31	2,310.91	41,596.45	20,798.23
1922	1,283.84			641.92	855.89	3,423.58	2,995.63	5,517.88	2,139.73	38,515.23	19,257.61
1923	1,188.74			594.37	792.49	3,169.98	2,773.73	5,109.15	1,981.24	35,662.25	17,831.12
1924	1,100.69			550.34	733.79	2,935.16	2,568.27	4,730.69	1,834.48	33,020.60	16,510.30
1925	1,019.15			509.58	679.44	2,117.74	2,378.03	4,380.27	1,698.59	30,574.62	15,287.31
1926	943.66			471.83	629.11	2,516.43	2,201.88	4,055.80	1,572.77	28,309.83	14,154.91
1927	873.76			436.88	582.51	2,330.03	2,038.77	3,755.37	1,456.27	26,212.80	13,106.40
1928	420.08			141.84	280.05	756.50	980.18	1,219.28	700.13	12,602.31	6,301.15
TOTAL $1,344,184.59	$24,144.53	$ 3,162.49	$ 4,721.94	$12,004.07	$16,096.35	$63,421.72	$53,343.10	$100,428.35	$38,102.21	$685,839.89	$342,919.94

"EXHIBIT B-2

CONTRACTS HELD AS OF MARCH 1, 1913, OPERATIONS UNDER WHICH WERE SUSPENDED

	CONTRACT NUMBER					
	1	2	5	8	14	15
Licensee	Petroleum Development Company	Coalinga National Oil Company	Recovery Oil Company	General Petroleum Corporation	Santa Maria Oil Fields of Cal.	General Petroleum Corporation
Date of license	Sept. 27, 1910	July 10, 1911	Mar. 18, 1912	Apr. 12, 1911	Feb. 8, 1913	Apr. 12, 1911
Patents licensed	996,736	996,736	996,736	996,736	996,736 1,002,474	996,736 1,002,474
Plant location	Fellows	Coalinga	Fellows	Brea Canyon	Cat Canyon	Kerto
Plant erected	Jan. 1911	July 1911	July 1912	Sept. 1912		Jan. 29, 1913
Plant capacity in bbls. per annum	3,285,000	365,000	365,000	273,750	Extension of #10	Extension of #9
Estimated oil run per annum	2,463,750					
Royalty per bbl.	1-½¢	2¢				
Estimated royalty per annum	$36,956.25					
Life of license, in years, from March 1, 1913	15-1/3	15-1/3	12	15-1/3		
Estimated Royalties 1913 (6 mo.)	$17,343.24					

"EXHIBIT C

TRUMBLE REFINING COMPANY OF ARIZONA

ROYALTIES RECEIVED UNDER CONTRACTS IN FORCE MARCH 1, 1913

	#1	#2	#4	#5	#6	#7	#8	#9	#3 & #10	#11	#13	#16	#17	Total
9/21/10 to 12/31/11	$20,548.46	$ 207.13	$	$	$	$	$	$	$	$	$	$	$	$ 20,755.59
1912	24,879.62	2,469.10	576.02	610.00	612.06	484.48	790.06	1,043.34						31,464.68
1/1—3/1/ 1913	4,201.18		96.57		136.95	501.49		62.44	#3 162.05					5,160.68
3/1—12/31/ 1913	11,976.41		357.48		322.04	2,279.81		666.01	#3 178.97	1,526.06	223.55	21,142.31	14,826.15	54,808.94
1914					368.04	1,185.09		2,102.80	1,310.15 2,017.75	5,039.61	69.05	32,941.20	25,040.93	68,764.47
1915			281.44		289.40	703.66			2,681.71	5,152.80		39,578.04		48,687.05
1916			278.41		213.39	673.65			1,667.33	5,031.75		82,704.92		90,569.45
1917			273.90		63.27	56.40			995.70	2,106.70		90,050.81		93,546.78
1918			150.18						932.43	2,089.31		75,842.11		79,014.03
1919			90.54						349.95	2,151.68		73,235.00	8,342.52	84,169.69
1920			28.52							1,350.96		76,895.21	31,819.44	110,094.13
1921									515.75	608.47		96,799.56	24,593.43	122,517.21
1922									1,775.42	80.00		149,819.68	13,622.97	165,298.07
1923									2,026.30			164,250.00	27,216.69	193,492.99
	$61,605.67	$2,676.23	$2,133.06	$610.00	$2,005.15	$5,884.58	$790.06	$3,874.59	$14,613.51	$25,137.34	$292.60	$903,258.84	$145,462.13	$1,168,343.76

"EXHIBIT D

TRUMBLE REFINING COMPANY OF ARIZONA

EXPENSES INCURRED FOR THE PERIOD SEPTEMBER 21, 1910 TO DECEMBER 31, 1923, AND ESTIMATED EXPENSES PER ANNUM FROM MARCH 1, 1913

Year	Commissions	Consulting fees	Salaries	Traveling Expenses	Apparatus Rent	Apparatus Depreciation	Development	Miscellaneous Expenses	Taxes and Licenses	Prof. & Legal	Total	Income Taxes	Plant Invest.
					Expenses Incurred								
9/21/10 to 12/31/11	$5,137.11	$1,680.00	$ 3,522.00	$1,714.95	$ 321.25	$	$	$ 693.86	$ 37.70	$	$13,106.87	$	$
1912	6,219.89	1,400.00	9,173.67	1,822.38	755.00			1,409.23	131.33		20,911.50		11,146.91
1913	3,825.73	1,400.00	11,253.77	1,693.36	1,357.12	1,664.94		1,593.69	327.45		23,116.06		30,950.77
1914		1,400.00	12,966.02	1,262.70	1,372.00	8,619.29	11,625.42	1,686.47	785.09		39,716.99		29,629.25
1915		1,120.00	10,415.70	368.98	1,429.25	2,620.28	919.74	1,374.55	1,301.45	1,765.20	21,315.15		14,412.42
1916			4,890.50	107.35	1,145.00	1,801.76		806.68	3,924.66	282.50	12,958.45		12,573.20
1917			3,648.00		810.00	1,407.45		244.87	1,681.85	241.40	8,033.57	13,524.74	11,623.75
1918			10,998.00		500.00	1,320.36		465.13	830.69	150.00	14,264.18	1,325.03	10,303.39
1919			15,000.00		360.00	1,066.34		1,532.41	1,598.58	1,537.50	21,094.83	760.51	9,237.05
1920			15,000.00		327.00	1,026.34		763.89	1,072.20	424.25	18,613.78	5,730.59	8,210.71
1921			15,000.00		373.50	1,423.33		1,105.16	1,206.60	386.75	19,495.34	9,458.27	8,325.71
1922			15,000.00		409.50	1,324.76		1,372.18	1,251.97	1,195.88	20,554.29	11,327.79	8,325.71
1923			15,000.00		378.00			1,464.12		963.57			8,325.71
					Estimated Expenses								
Per annum from March 1, 1913			15,000.00	600.00	1,200.00	2,000.00		1,200.00	350.00		20,350.00		

"EXHIBIT 'E'

"STATE OF CALIFORNIA)
) SS
CITY AND COUNTY OF SAN FRANCISCO)

"JOHN BARNESON, being first duly sworn, deposes and says:

"That he is a citizen of the United States of America, over twenty-one years of age, and competent to bear witness.

"That from May 16, 1910, and during all times herein mentioned he was vice-president and managing director of General Petroleum Company (originally called the Esperanza Consolidated Oil Company), and from 1916 to the present date the president of the General Petroleum Corporation (the successor to the General Petroleum Company).

"That during the period July, 1910 to April, 1911, he became interested in the patents held by the Trumble Refining Company and caused extensive investigations to be made of the process and apparatus covered by such patents.

"That the investigations made showed that with the use of the process and apparatus covered by the patents owned by the Trumble Refining Company great economies could be effected in the refinery costs and operations of this company.

"The deponent entered into negotiations with the Trumble Refining Company for the use of such process and

apparatus in the operations of the Esperanza Consolidated Oil Company.

"That at the time of such negotiations the Esperanza Consolidated Oil Company planned the construction of a refinery at Los Angeles, California, and held as owner in fee and lessee producing oil properties with assured production to warrant the construction of pipe lines from the fields to the refinery site; and in addition to such producing properties were the owners of a large known oil territory; and that said production was at that time approximately 15,000 barrels per day, and with the drilling program would be rapidly increased.

"That as a result of such negotiations on April 12, 1911, the Esperanza Consolidated Oil Company entered into an agreement with the Trumble Refining Company and Milon J. Trumble, Francis M. Townsend, A. J. Gutzler and John Randolph (the principal stockholders of the Trumble Refining Company) whereby in consideration of the covenants on the part of the Esperanza Consolidated Oil Company to use the patented process and apparatus exclusively in its operations and to do everything in its power to further the interests of the Refining Company, one-half of the stock of the Refining Company would be transferred to the Oil Company at a nominal consideration.

"That upon execution of the agreement aforesaid, the Oil Company proceeded to have small plants embodying the apparatus for the use of such process erected at different locations in the field until such time as the Los Angeles plant and pipe lines thereto would be constructed and in operation.

"That such apparatus was installed and put in operation in plants in the field as follows:

July, 1912					
Sibyl Lease	capacity	182,500	barrels	per	annum.
July, 1912					
Nevada Midway	"	365,000	"	"	"
Sept. 1912					
Olinda-Delaware Union	"	273,750	"	"	"
Aug. 1912					
Kerto	"	365,000	"	"	"
Dec. 1912					
Cat Canyon	"	730,000	"	"	"

"That the contract for the construction of the pipe line to Los Angeles was signed on March 7, 1912, and the line completed early in 1913.

"That the construction of the plant at Los Angeles was begun in 1912 and such plant completed and placed in operation with a capacity of 20,000 barrels per day in May, 1913.

"That at the time construction was under way, the Esperanza Consolidated Oil Company controlled production to be served by the pipe line more than sufficient oil to keep such plant in capacity operation; without taking into consideration undeveloped known oil properties; and that such supply of oil was assured for in excess of the life of the patents covering the Trumble process and apparatus.

"That this deponent is informed that in connection with the valuation of its patents the Trumble Refining Company has been informed by representatives of the Treasury Department that the royalties received prior to the operations of 1913 would only be considered. Such a position in the opinion of this deponent is untenable, as the royalties to accrue from the operations of the Los Angeles plant were assured at the date of valuation, which this deponent understands to be March 1, 1913, as well as the royalties from the Mojave plant which was arranged for in about December, 1912, and completed in 1913 with a capacity of 10,000 barrels per day.

.....

"TRUMBLE REFINING COMPANY OF ARIZONA
804 Higgins Building,
Los Angeles, California.

JURAT

"F. M. Townsend, being duly sworn, deposes and says that he is the president of the Trumble Refining Company of Arizona, that he has read the foregoing brief, and that the facts contained therein are true and correct to the best of his knowledge and belief.

F. M. TOWNSEND

Subscribed and sworn to before me this 29th day of April, nineteen hundred and twenty-four.

PEARL TROLLE
Notary Public."

(Testimony of E. P. Adams)

CROSS EXAMINATION

by Mr. Harpole:

I was with Haskins & Sells from November, 1920 until October, 1923 and during that time did some work for the Trumble Refining Company in connection with its income and excess profits tax for the year 1917. After leaving Haskins & Sells I carried on work for the Trumble Refining Company until 1926.

I don't recall that I ever informed Trumble Refining Company that their claim for refund filed on the 2nd day of July, 1920 had been reopened by the Commissioner of Internal Revenue because I was handling the case from the beginning and I was fighting it as hard as I could, naturally. Of course, they knew nothing of taxes. I did not file the claim for refund on July 2, 1920. I was in Washington at that time, working for the Government as Section Unit Auditor under Corporation Section, Income Tax Division. My connection with the Government ceased in October, 1920.

I do not know what division of the Commissioner's office was charged with the duty of reopening or rejecting claims for refund in 1920, or at any later date. I know nothing about a section of the Bureau of Internal Revenue called "Claims Control Section". I had a conference on December 9, 1922 with a man who was in charge of the Special Audit Section. My understanding was that the function of the Special Audit Section was the handling of 210 cases—that is, special assessment cases. I made no endeavor to have the case of Trumble Refining Company transferred from the Special Assessment Section to any other section.

(Testimony of E. P. Adams)

EXAMINATION BY THE COURT

I had a conference with an auditor in the 210 Section, also known as the Special Assessment Section, on December 9, 1922. I can get it clear. I was in Washington on other cases along with the Trumble case and I went and found where this Trumble case was to be assigned and it was forwarded to this gentleman. I asked him if we could take up that case, referring to the 1917, 1918, 1919 and 1920, all in one. In other words, this brief has been filed in February. And he informed me that they had not reached the review of the Revenue Agent's report and my protest filed in Washington and, therefore, could not take it up at that time. We discussed it along as to the points involved and I said "Well, we will take the 1917 claim and all the rest, and take them all up together."

He said, "Yes."

CROSS EXAMINATION

resumed by Mr. Harpole:

I did not acquiesce in the application of the provision of the Special Assessment Section to the computation of the tax of the Trumble Refining Company for the year 1917 and subsequent years. I protested it when I visited the Capital in February, 1922, claiming invested capital on the basis paid in for stock. I used "invested capital" all the way through my protest. I, frankly, don't understand you when you ask whether I protested the use of special assessment in computing the tax or only protested the amount of invested capital used in applying special assessment.

I did not prepare the claim for abatement that was filed in June, 1920. I filed no protest to the letter of

(Testimony of E. P. Adams)

February 21, 1920. I do not recall that I ever discussed the letter of February 21, 1920 and its proposal with any one in the Bureau of Internal Revenue because this same thing was covered by the protest of February, 1922, protesting to any additional assessments based on the fact of asking refunds by using invested capital. This letter was before my time, and I don't recall having discussed that with any one. Naturally, the Trumble Refining Company requested me to take up the matter covered by this letter. I was entrusted with the taking up of the entire case from 1917 on, starting with the refund claim of 1917, right on, with the Revenue Agent's report.

I do not recall the name of the man with whom I held this conference in the Special Audit Section. Only he and I were present. At the time of the conference on December 9, 1922 I discussed the Revenue Agent's report covering the years 1917 to 1919, inclusive.

At the conference in May, 1924 Mr. McGinley, representative of the Commissioner, Mr. Townsend, the president of the company, and myself were present.

I next had a conference in November, 1923 following the one on December 9, 1922. There was correspondence in the interim, but the files cannot be located.

The witness E. P. Adams was then excused.

It was then stipulated by counsel in open Court that:

"The Commissioner of Internal Revenue, on November 6, 1924, issued notices of deficiencies for the years 1918, 1919 and 1920 to the Trumble Refining Company, wherein he proposed additional taxes; and that within the sixty-day period provided in the Statute, and in the letter, the Trumble Refining Company appealed to the United States Board of Tax Appeals."

Thereupon counsel for the plaintiffs introduced in evidence as plaintiffs' Exhibit 5 the following decision of the United States Board of Tax Appeals:

PLAINTIFFS' EXHIBIT 5

"UNITED STATES BOARD OF TAX APPEALS.

M. J. TRUMBLE, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

A. J. GUTZLER, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

FRANCIS M. TOWNSEND, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent,

TRUMBLE REFINING COMPANY OF ARIZONA, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

DOCKET NOS. 8007, 8008, 8009, 11763, 17492, 26434, 28985 and 32151. Promulgated November 19, 1928.

A composite March 1, 1913 value determined for license contracts.

A. L. Weil, Esq., and F. L. A. Graham, C. P. A., for the petitioner.

C. H. Curl, Esq., and I. R. Blaisdell, Esq., for the respondent.

"In these proceedings, which were consolidated for trial, the petitioners seek redeterminations of the deficiencies which respondent has asserted for the years and in amounts as follows:

Petitioner	Docket No.	Year	Deficiency
M. J. Trumble	8007	1918	$ 8.76
		1919	444.65
		1920	847.33
	28985	1922	2,513.68
A. J. Gutzler	8008	1918	49.98
		1919	415.98
		1920	697.91
Francis M. Townsend	8009	1918	31.58
		1919	424.41
		1920	584.31
Trumble Refining Company of Arizona	11763	1918	25,150.19
	17492	1920	26,604.39
		1921	28,885.12
	26434	1922	5,431.85
	32151	1923	5,431.85

"In Docket Nos. 8007, 8008, 8009 and 28985, the petitioners allege error in respondent's action in holding that distributions made to them by the Trumble Refining Company were ordinary dividends subject to tax. Further allegations of error were made in Docket Nos. 8007, 8008

and 8009, but these were withdrawn at the hearing of April 22, 1927, and before the proceedings came on for trial on the merits. In Docket No. 28985, it is also alleged that respondent erred in disallowing $600.00 of a total deduction of $1,200.00 claimed as expense of operating an automobile for business purposes. In Docket Nos. 11763, 17492, 26434 and 32151, the sole question raised is the value of certain license contracts at March 1, 1913, for the purpose of computing the annual deduction for exhaustion. In an amended answer to the petitions in the last mentioned cases, respondent alleges that he erred in fixing the value of the license contracts, as of March 1, 1913, at $160,000.00; and that said contracts had no value at March 1, 1913, which could be made the subject of an allowance for exhaustion.

"FINDINGS OF FACT.

DOCKET Nos. 8007, 8008, 8009 and 28985.

"M. J. Trumble, A. J. Gutzler, and Francis M. Townsend are citizens of the United States and residents of California.

"During the years in controversy, these petitioners received certain moneys by way of distributions made by the Trumble Refining Company. Respondent has held that said distributions constituted ordinary dividends, and are so taxable to the petitioner.

"In his return for 1922, M. J. Trumble, Docket No. 28985, claimed a deduction of $1,200.00, as the expense of operating an automobile for business purposes. Respondent disallowed one-half the deduction claimed, to-wit: $600.00, on the ground that the automobile was used only '50 per cent of the time' for business purposes.

"The Trumble Refining Company of Arizona is an Arizona corporation with its principal office at Los Angeles, California.

"On April 12, 1911, the Trumble Refining Company and its stockholders, Milon J. Trumble, Francis M. Townsend, A. J. Gutzler and John H. Randolph, entered into an agreement with the Esperanza Consolidated Oil Company (name changed in 1912 by court decree to General Petroleum Company), which had for its purpose the acquisition by the Oil Company of an interest, through the purchase of stock in the Refining Company. Under its terms, the Refining Company sold 200,000 shares of its preferred and 800,000 shares of its common capital stock to the Oil Company for $25,000.00 cash, and the stockholders sold 200,000 shares of common and 800,000 shares of preferred capital stock of the Refining Company to the Oil Company for $50,000.00 cash. The agreement recites that at the date thereof the authorized capital stock of the Refining Company consisted of 1,000,000 shares of preferred and 4,000,000 shares of common, all of the par value of $1.00 per share, of which there was outstanding 600,000 shares of preferred and 2,400,000 of common. The agreement reads in part as follows:

"WHEREAS, according to the representations made by the Refining Company, the Stockholders and the Inventor to the Oil Company, the Inventor has invented valuable machines, apparatus and processes for the evaporation and refining of petroleum and other oils and liquids and gas, and patents for the same have been issued, and applica-

tions for other patents for the same are now pending, and the Inventor has assigned the same to the Refining Company, and contemplates and intends to assign to the Company further improvements and processes, in any manner relating to the same, which may from time to time hereafter be invented by him; and

"WHEREAS, it is deemed by the Refining Company to be for the advantage of the Refining Company that the Oil Company shall become a stockholder in the Refining Company, relying on the representations made to the Refining Company by the Oil Company that the Oil Company will aid and assist the Refining Company in pushing the business of the Refining Company and will do everything in its power to further the interests of the Refining Company; and

"WHEREAS, as a further consideration for the sale of the stock agreed to be sold to the Oil Company by the Stockholders at the price and at the time hereinafter provided, it is deemed by the Stockholders to be for the advantage of the Stockholders that the Oil Company shall become a stockholder in the Refining Company, relying on the representations made to the Stockholders by the Oil Company that the Oil Company will aid and assist the Refining Company in pushing the business of the Refining Company and will do everything in its power to further the interests of the Refining Company; and

"WHEREAS, the Oil Company, relying upon the representations made to it, as hereinabove stated, deems it to be for its advantage to become interested in the Refining Company as a stockholder thereof.

"During the negotiations which resulted in the aforementioned agreement, the representatives of the Oil Company orally represented to the representatives of the Refining Company that the Oil Company was entering upon the development of a large acreage of new oil land and into the field of refining crude oil; that it was building a pipe line to deliver 30,000 barrels of oil a day at Los Angeles or in the vicinity thereof; that in its operations a very large use would be made of the apparatuses and processes covered by the patents of the Refining Company, which the Oil Company would use exclusively; and that license agreements for the use of such apparatuses and processes by the individual refining plants would be obtained as such plants were erected. The purchase prices stipulated in the agreement to be paid by the Oil Company to the Refining Company and its stockholders for the capital stock acquired from them were fixed after due consideration of these oral representations and were based largely thereon.

"Under dates of July 4, 1911 and September 5, 1911, there were issued to Milon J. Trumble, United States letters patent Nos. 996,736 and 1,002,474, respectively. The first mentioned patent covered the invention of an evaporator for petroleum oils or other liquids, and the later patent covered the invention of an apparatus for refining petroleums. In 1911, these patents were assigned by Trumble to the Trumble Refining Company. The following is a brief resume of license agreements entered into by the Trumble Refining Company with other companies, between September 27, 1910 and June 11, 1913:

	Date of Agreement	Licensed Under Patent No.	Term of Agreement	Royalty
1. Petroleum Development Company	Sept. 27, 1910	553,656	Life of patent	$.03 per bbl.
2. Coalinga National Oil Company	July 10, 1911	996,736	" " "	.02 " "
3. John R. Ott Contracting Company	Feb. 15, 1912	996,736) 1,002,474)	" " "	.05 " "
4. General Petroleum Company (Sibyl Lease-Taft)	Mar. 15, 1912	996,736	10 years	.01 " "
5. Recovery Oil Company	Mar. 18, 1912	996,736	2 "	.01 " "
6. General Petroleum Co. (Nevada-Midway)	May 15, 1912	996,736	5 "	.01 " "
7. " " " (Olinda)	June 26, 1912	996,736	2 "	.01 " "
8. " " " (Brea Canyon)	June 26, 1912	996,736	2 "	.01 " "
9. " " " (Kerto, Taft)	Aug. 28, 1912	996,736 1,002,474)	Life of Patent	.01-½ per bbl.
10. Santa Maria Oil Fields of California, Limited	Sept. 28, 1912	996,736	Not stated	.02 per bbl.
11. Warner Quinlan Asphaltum Company	Oct. 26, 1912	996,736) 1,002,474)	" " " "	(.02 " " * (.01-½ per bbl. **
12. Pacific Crude Oil Company	Nov. 30, 1912	996,736	Life of Patent	.01-¼ " "
13. American Union Oil & Refining Company	Jan. 8, 1913	996,736) 1,002,474)	" " " " " "	(.02-½ " " # (.01-½ " " ##
14. Santa Maria Oil Fields of California, Limited	Feb. 8, 1913	1,002,474	Not stated	.00-½ " "
15. General Petroleum Co. (Los Angeles)	June 11, 1913	996,736) 1,002,474)	Life of Patent	.01-½ " "
16. General Petroleum Co. (Mojave)	June 11, 1913	996,736(1,002,474(	Life of Patent	.01-½ " "

*For Grade D Asphaltum.

**For asphaltum oils for road making purposes.

#For 4 refined cuts.

##For 2 refined cuts.

"In 1915, the Trumble Refining Company sold its patents to W. Meischke-Smith for $1,000,000.00 cash, the Company reserving to itself however, all rights under the above listed license agreements and all royalties which might thereafter accrue under those agreements.

"The Petroleum Development Company has been merged with the Chancellor-Canfield Midway Oil Company, a subsidiary of the Atcheson, Topeka and Santa Fe Railway Company. The Income Tax Unit of the Bureau of Internal Revenue has determined the net oil reserves of the Chancellor-Canfield Midway Oil Company as of March 1, 1913, to have been 55,519,171 barrels.

"At March 1, 1913, the General Petroleum Company held, in fee, under lease, and under contract, 23,694.04 acres of land in California, and held under lease 24,493.68 acres in the Republic of Mexico. These lands were being developed as rapidly as possible, and on the date stated there were 160 producing wells on the California lands, six more wells were being brought in, and twenty-six additional wells were being drilled. From the Midway Fields to Los Angeles there had been constructed 158 miles of pipe lines. Construction of a spur at Mojave, California, of a refinery at Kerville, in the Midway Field, and of a refinery, with a capacity of approximately 20,000 barrels per day, at Vernon, had been completed, and a 20,000 barrel refinery was in course of construction at Mojave. The company owned four 10,000 ton ships, and had ar-

ranged through Andrew Weir, who held a large interest in the company and was also a large ship-owner in England, for charters of other ships. The company had approximately 202,000 barrels of oil in storage, and was producing about 8,500 barrels per day from its own wells and handling an additional 7,000 barrels per day under purchase contracts.

"In 1923, the Income Tax Unit of the Bureau of Internal Revenue, determined that at July 11, 1916, the net oil reserves in the lands held by the General Petroleum Company on March 1, 1913, amounted to 32,896,058 barrels. In arriving at the net reserves, the Income Tax Unit deducted royalty oils of 3,789,004 barrels. Between March 1, 1913 and July 11, 1916, there were extracted from these same lands 13,314,841 barrels of oil.

"The following is a statement of the total capacity, based upon the patented facilities in use and in course of construction at March 1, 1913, of each of the licensee's plants, from March 1, 1913 to the termination of their respective agreements, the number of barrels of oil actually treated by each of the licensees between March 1, 1913 and January 1, 1928, and the royalties earned between those same dates:

		Total capacity Barrels	Oil actually treated Barrels	Royalties earned
1.	Petroleum Development Co.	50,640,875	3,601,622	$ 61,605.77
2.	Coalinga National Oil		10,357	207.13
3.	John R. Ott Contracting Co.			
4.	General Petroleum Co. (Sibyl Lease, Taft)	730,000	244,990	2,449.90
5.	Recovery Oil Company		61,000	610.00
6.	General Petroleum Co. (Nevada-Midway)	1,825,000	200,515	2,005.15
7.	General Petroleum Co. (Olinda)	1,368,750	588,458	5,884.58
8.	General Petroleum Co. (Brea Canyon)		79,006	790.06
9.	General Petroleum Co. (Kerto, Taft)	5,884,000	253,041	3,874.59
10.	Santa Maria Oil Fields of Calif., Ltd.	11,680,000	1,097,638	25,614.80
11.	Warner Quinlan Asphaltum Co.	11,315,000	1,366,990	25,137.34
12.	Pacific Crude Oil Company	28,297,000		
13.	American Union Oil & Refining Company	5,657,500	9,632	292.60
14.	Santa Maria Oil Fields of Calif., Ltd.			
15.	General Petroleum Co. (Los Angeles)	109,500,000	129,045,113	1,935,676.69
16.	General Petroleum Co. (Mojave)	54,750,000	21,294,225	226,231.23
	Totals	281,648,625	157,852,587	$2,290,379.84

"The agreements with the General Petroleum Company of August 28, 1912, with the Santa Maria Oil Fields of California, Limited, of September 28, 1912, with the Pacific Crude Oil Company of November 30, 1912, with the American Union Oil & Refining Company of January 8, 1913, and with the General Petroleum Company of June 11, 1913, being the agreements numbered above 9, 10, 12, 13, 15 and 16, provide that the licensees shall use the patented apparatus of the Trumble Refining Company to the exclusion of all other methods and processes for treating oils.

"In February, 1913, Francis M. Townsend, president of the Trumble Refining Company, sold 1,000 shares of the common capital stock of that company for $500.00 to A. L. Weil, a director of the company and general counsel of the General Petroleum Company. At March 1, 1913, the outstanding capital stock of the Trumble Refining Company was 800,000 shares of preferred and 3,200,000 shares of common, all of the par value of $1.00 per share.

"Respondent has fixed the value of these license agreements, as of March 1, 1913, at $160,000.00 and, in computing net income of the Trumble Refining Company for the years on appeal, has allowed an annual deduction for exhaustion of the agreements based upon that value.

"OPINION

"MILLIKEN: The issues raised in Docket Nos. 8007, 8008, 8009 and 28985 will be disposed of first. These petitioners complain of respondent's action in including in net income of the years in controversy as ordinary dividends subject to the tax, the entire amounts received in those years as distributions from the Trumble Refining

Company of Arizona. It is contended that a portion, if not all, of such distributions were in fact liquidating dividends or a return of capital not subject to tax. The allegations of the petitions are specifically denied by the respondent in his answers. No evidence was offered by the petitioners in support of those allegations. Under the circumstances, we may not disturb the action of the respondent of which petitioners complain.

"In the case of M. J. Trumble, Docket No. 28985, it is further alleged that respondent erred in disallowing $600.00 of a total deduction of $1,200.00 claimed in the return for 1922, as expense of operating an automobile for business purposes. No evidence was offered by the petitioner in support of the material averments of his petition. We are unable, therefore, to find error in respondent's action.

"In the appeals of the Trumble Refining Company of Arizona, Docket Nos. 11763, 17492, 26434 and 32151, the sole question raised is the value of certain license contracts at March 1, 1913, for the purpose of computing the annual deduction for exhaustion. The petitioner claims a total value for these contracts at March 1, 1913, of $1,400,000.00. The respondent has computed the annual deductions for exhaustion upon the basis of a March 1, 1913 value for the contracts of $160,000.00. In an amended answer respondent alleges error in the value previously determined by him, and asserts that they were without any value at the basic date, which might be made the subject of an allowance for exhaustion.

"We are not certain of the position of the respondent in this proceeding. At the hearing, counsel filed an amended answer alleging error in allowing a March 1, 1913 value for the contracts of $160,000.00 and that the contracts had no value as of March 1, 1913, which was

or is subject to exhaustion allowances under the Revenue Acts of 1918 and 1921. We will proceed upon the understanding that only a question of fact is involved, i.e., the March 1, 1913, value of the contracts in question. Counsel for respondent in brief filed does not contest the legal right to an exhaustion allowance if the contracts did in fact have an ascertainable value on March 1, 1913, or the long line of Board decisions wherein allowances have been claimed before and allowed by us.

"Petitioner has offered proof of the value claimed for the contracts along three lines:—First, evidence as to a certain transaction which occurred in February, 1913, in which 1,000 shares of its common capital stock was exchanged between two individuals for a cash consideration; secondly, evidence of existing circumstances and conditions, at March 1, 1913, as the basis of prognosticating the future earnings under these agreements; and thirdly, the actual results obtained under these contracts to the beginning of the present year.

"The stock transaction referred to is that in which Francis M. Townsend, president of petitioner company, sold to A. L. Weil, a director of petitioner and general counsel of the General Petroleum Company, in February, 1913, 1,000 shares of petitioner's common capital stock for $500.00 cash. The petitioner relies upon this transaction as establishing a value of fifty cents per share for the entire 3,200,000 shares of common stock outstanding at March 1, 1913, and then reasons that 'If the common stock had a value of fifty cents a share, the preferred shares were necessarily worth par ($800,000.00), and, therefore, the value of the outstanding stock at the time of the sale, which was just prior to March 1, 1913, was $2,400,000.00'. From this sum, the petitioner deducts

$1,000,000.00, the selling price of the patents in 1915, leaving $1,400,000.00 which it claims represents the March 1, 1913 value of the rights under the license contracts. The obstacles to accepting this line of reasoning or method of valuation are insurmountable, for the reasoning or method lacks the support of proven facts and takes too much for granted. The stock involved in this transaction was but one thirty-second of one per cent of the common stock, and only one-fortieth of one per cent of all the stock, outstanding at the basic date. To conclude that the selling price of this negligible quantity of stock fixes the fair market value of all the stock, both common and preferred, notwithstanding the utter lack of proof in that direction, requires the indulgence in assumptions as to diverse factors affecting the marketability of 4,000,000 shares of stock and the rights of preferred shareholders, which we are unwilling to make. The method requires the further assumptions, wholly without proof of facts upon which to premise them, that the March 1, 1913 value of the patents was neither greater nor less than the selling price in 1915, and that the petitioner, though apparently manufacturing all of the patented apparatus for its licensees, had no assets of value, other than the patents and license contracts. Further, it is a matter of common knowledge that the selling price or fair market value of the capital stock of a corporation frequently bears no relation to, and is not a reliable index of, the intrinsic value of the assets behind it; and, for aught that we may know, this case offers no departure from such a situation.

"Other methods of valuing the rights under the license agreements, as of March 1, 1913, are suggested by the petitioner, but, like the first, they depend too greatly upon the most optimistic speculation and their bases lack the essential support of proven facts. One of these is based

upon the total number of barrels of oil which the licensees, with the facilities in use or in course of construction at March 1, 1913, would be able to treat between that date and the termination of their respective agreements, that is 281,648,625 barrels. The petitioner deducts from this number twenty-five per cent thereof to take care of probable losses from casualties, strikes, fires, and the risks of operation, and by pro rating the remainder, 211,236,469 barrels, amongst the sixteen agreements and applying the applicable royalty rates, it determines that the anticipated future earnings, at March 1, 1913, were $3,208,222.03. This sum is then discounted to its present value, at March 1, 1913, by the application of Hoskold's formula, the petitioner finally arriving at a value of $2,175,078.29. This method is offered to us with the suggestion that 'It is well known that refinery units are expensive to erect, and it cannot be presumed that parties will actually build plants that are larger than they have an economic use for'. Nevertheless, the record shows that the plants of the sixteen licensees were capable of treating a total of 281,-648,625 barrels, between March 1, 1913 and the termination of their agreements, but that they actually treated up to January 1, 1928, only nine months prior to the expiration of the patents and termination of all agreements, only 157,852,587 barrels, just fifty-six per cent of their possible capacity; and, if we leave out of the reckoning the two plants of the General Petroleum Company, at Los Angeles and Mojave, which were not completed until after the basic date, we find that as against a total rated capacity, for the fourteen plants of the other licensees, of 117,398,625 barrels, those plants, with but nine months remaining for their agreements to run, actually treated only 7,513,249 barrels, just approximately seven per cent of possible production. It does not appear that this wide

difference between possible production and actual production is entirely due to the result of conditions which arose after March 1, 1913, and which could not have been foreseen at that date. In the case of the Pacific Crude Oil Company, the possible production with the facilities at hand at March 1, 1913, to the termination of its license agreement, amounted to 28,297,000 barrels, but the record shows that not a single barrel of oil was treated by this company to the beginning of 1928, although it was obligated under its agreement to use the petitioner's patented apparatus for the treatment of oil to the exclusion of all other methods and processes. The American Union Oil Company had facilities at March 1, 1913, capable of treating, from then to the termination of its agreement, 5,657,500 barrels of oil, but up to the beginning of 1928 it had actually treated only 9,632 barrels of oil, approximately one-sixth of one per cent of possible production, though it too was obligated to use the petitioner's patented apparatus for treating oil exclusively. Hardly less striking is the case of the Petroleum Development Company with facilities at March 1, 1913, capable of treating, to the termination of its agreement, 50,640,875 barrels, though, up to the beginning of the present year, it has actually treated only 3,601,622 barrels, approximately seven per cent of possible production. The Pacific Crude Oil Company, without production of a single barrel of oil during its agreement, could not have been treating, or have been in a position to treat oil with petitioner's patented apparatus at March 1, 1913; while the American Union Oil Company and the Petroleum Development Company, with facilities of a rated capacity of approximately 1,200 barrels and 11,000 barrels per day, respectively, have had an approximate actual average daily production of but three and 770 barrels, respectively; and there is not a bit of

evidence that the facilities of the last two mentioned companies were being used to any greater extent at March 1, 1913, or that there was any prospect, at that date, of any greater use in the future.

"Another method suggested by petitioner is based upon the quantity of oil being handled by the General Petroleum Company at March 1, 1913, as the result of production from its own wells and oil acquired under purchase contracts, and the net oil reserves of the Chancellor-Canfield Midway Oil Company with which the Petroleum Development Company was merged though the time of the merger does not appear in the record. At March 1, 1913, the General Petroleum Company was producing about 8,500 barrels of oil per day from its own wells and was handling an additional 7,000 barrels per day under purchase contracts. At the same date, the net oil reserves of the Chancellor-Canfield Midway Oil Company amounted to 55,519,171 barrels. Based on these facts, the petitioner suggests that an estimate, at March 1, 1913, of the total amount of oil which the General Petroleum Company and the Petroleum Development Company would treat until the expiration of their agreements would have been 143,210,421 barrels. To this quantity the petitioner applies a royalty rate of 1-1/2 cents per barrel, and thereby determines that the expected future royalties from these companies amounted to $2,148,156.31. This sum is then discounted to its present value, at March 1, 1913, by the application of Hoskold's formula, the petitioner finally arriving at a value of $1,456,385.53. There are several objections to the suggested method. There was placed in evidence a resume of the twelve contracts under which the General Petroleum Company was purchasing oil at March 1, 1913. Of these twelve contracts, six expired during 1913, three expired

during 1914, one expired in 1916, the term of another is not shown, and one, the contract with the Ohio Valley Construction Company, does not expire until June 16, 1930. Whether there have been renewals of the contracts which have expired, or what the prospects for such renewals were at March 1, 1913, does not appear in the record. The contract with the Ohio Valley Construction Company calls for the purchase of 500,000 barrels of oil and all production thereafter to the termination of the contract. There is no evidence as to the probable amount of oil which the General Petroleum Company would acquire under this contract. The estimate of the total quantity of oil which would be treated by the General Petroleum Company and the Petroleum Development Company, includes 55,519,171 barrels for the Petroleum Development Company which represents the net oil reserves of the Chancellor-Canfield Midway Oil Company at March 1, 1913. There is no evidence whether the merger of the Petroleum Development Company with the Chancellor Canfield Midway Oil Company took place before or after March 1, 1913, or, if after, whether such a merger was contemplated at that date. Further, there is nothing to show that there was any probability, at March 1, 1913, that the entire oil reserves of the Chancellor-Canfield Midway Oil Company would be extracted and treated prior to the expiration of the license agreement.

"With the foregoing observations we reject the several methods of valuation suggested by the petitioner.

"There is much, however, in the evidence which convinces us that the license contracts had a considerable value at March 1, 1913. Both the president of the General Petroleum Company and the president of petitioner, who represented their respective companies in the negotia-

tions, testified that the General Petroleum Company, then known as the Esperanza Consolidated Oil Company, as an inducement to the petitioner to enter into the agreement of April 12, 1911, by which for a nominal cash consideration the Petroleum Company acquired a one-third interest in the petitioner, represented to the petitioner that it was entering upon the development of a large acreage of new oil land, that it was building a pipe line to deliver 30,000 barrels of oil per day at Los Angeles, that it proposed to use the patented apparatus of the petitioner exclusively for the treatment of this oil, and that license agreements for the use of such patented apparatus by its individual refining plants would be obtained as such plants were erected. The agreement itself supports the testimony of these two witnesses that the cash consideration stipulated therein was not the sole consideration, for it makes specific reference to representations made by the parties to each other; and the subsequent actions of the Petroleum Company, which are entirely in line with these representations, corroborates the testimony of these witnesses. There can be little doubt that out of these representations there arose obligations on the part of the General Petroleum Company and rights to the petitioner, which were just as binding and enforceable as though they had been specified in detail in the agreement, and not the least of these was the obligation of the Petroleum Company to use the apparatus covered by petitioner's patents exclusively in the treatment of crude oil.

"At March 1, 1913, the General Petroleum Company held in fee simple, by lease, and by contract 23,694.04 acres of oil lands in California, and 24,493.68 acres of such lands in the Republic of Mexico. All of these lands were being developed as rapidly as it was possible to do so. Already 160 producing wells had been brought in on the

California lands, six more were being brought in, and twenty-six additional wells were being drilled, but all of this represented the development of only nine hundred acres of its lands. From these producing wells alone, the company was realizing an average daily production of 8,500 barrels of crude oil. In addition to this daily production, the company had approximately 202,000 barrels of oil in storage, and was handling under purchase contracts approximately 7,000 barrels of oil per day. An investigation of its lands by the Income Tax Unit led to the determination that the company's oil reserves at July 11, 1916, in lands which it held at March 1, 1913, was 32,986,058 barrels, but in arriving at this figure there were deducted royalty oils of 3,789,004 barrels. Between March 1, 1913 and July 11, 1916, there were extracted from these same lands 13,314,841 barrels of oil. Thus, at March 1, 1913, the General Petroleum Company was in possession of oil reserves amounting to 49,999,903 barrels, which it was then bringing to the surface at the rate of 8,500 barrels per but it had already adopted the policy of rapid development of its other lands, a policy which was being carried into effect at the date stated. As a matter of fact, the average daily production between March 1, 1913 and July 1, 1916, amounted to approximately 14,000 barrels. The company already had in operation five plants, the patented facilities of which were capable of treating to the termination of the agreements, approximately 10,000,000 barrels of oil. The pipe line had been completed to Los Angeles, where, and at Mojave, refineries were under construction. Both of these

refineries were located in accordance with petitioner's recommendations, were designed by the petitioner, and were being constructed under petitioner's supervision. The combined facilities of these two refineries when completed were capable of treating, during the life of the license agreements, approximately 164,000,000 barrels of oil, and there were actually treated in those plants up to the beginning of 1928, when the agreements had approximately nine months to run, 157,852,587 barrels of oil which yielded to petitioner royalties of $2,161,907.92.

"There is little of evidence as concerns existing conditions at March 1, 1913, in the case of the other licensees. As to them we know nothing more than the possible production of their facilities from March 1, 1913, to the termination of their agreements, the actual production up to the beginning of the present year, and the royalties paid to petitioner by those licensees.

"The facts given to us are not readily adaptable to the application of any mathematical formula as a means of checking the reasonableness of our own judgment. Recognizing all the facts in existence or in contemplation on March 1, 1913, we have sought to determine what a willing buyer and willing seller, without any compulsion to act in the matter but purely in their own mercenary interests, would fix upon as a fair price for these agreements at the date stated. We have disregarded none of the evidence, but have given all of it due consideration, and have reached the conclusion that these license agreements had a fair market value at March 1, 1913 of $850,000.00. Since the average life of these agreements, at March 1,

(Testimony of A. J. Gutzler)

1913, was eleven years, eight months, twenty days, the petitioner is entitled to a deduction for exhaustion for each of the years in controversy, in the amount of $72,511.90.

Judgment will be entered

Under Rule 50."

It was then stipulated by counsel in open Court that:

"The final orders of the Board of Tax Appeals based upon its decision were entered on April 30, 1929."

A. J. GUTZLER,

called as a witness on behalf of the plaintiffs, after being first duly sworn, testifies as follows:

DIRECT EXAMINATION

by Mr. Mackay:

I am one of the Trustees of the Trumble Refining Company, a dissolved corporation, which was the corporation that took appeal to the United States Board of Tax Appeals, in which it claimed the right to deduction for depreciation of license agreements. The Board held it was entitled to a deduction of $72,511.90 per year. The Trumble Refining Company had the same license agreements in 1917 that it had in 1918.

CROSS EXAMINATION

by Mr. Harpole:

I remember writing and signing a letter to Mr. David Burnet, Deputy Commissioner of Internal Revenue, on August 5, 1930.

The witness A. J. Gutzler was then excused.

(Testimony of Frank M. McDonnell)

FRANK M. McDONNELL,

called as a witness on behalf of the plaintiffs, after being first duly sworn, testifies as follows:

DIRECT EXAMINATION

by Mr. Mackay:

I am a certified public accountant, certified in 1922. I was associated with Haskins & Sells in 1920 and had charge of the Trumble Refining Company income tax case at that time. I prepared the claim for abatement filed on June 17, 1920 and the claim for refund of $11,870.88. Exhibits "D" and "F", respectively, of Plaintiffs' "Exhibit 1".

I prepared a claim for refund signed by Mr. Gutzler, or by the Trumble Refining Company by Mr. Gutzler, on June 17, 1920. That claim was on printed Form 47-A. That was crossed out and "46" written underneath and the claim was printed "Claim for Credit", but above the "credit" is marked in ink "A Refund". In the body of that claim were the words, "We hereby claim refund of tax paid for the reason set forth in the letter attached hereto". This claim for refund and the claim for abatement were filed at the same time and were pinned together. They had attached to them a copy of a letter dated June 16, 1920. Exhibit "F" of Plaintiffs' "Exhibit

(Testimony of Frank M. McDonnell)

1" contains the same writing in the body of it. It says: "We hereby claim refund of tax paid for the reason set forth in letter attached hereto". That is my writing. The claim for refund last referred to is dated July 2, 1920. The subsequent claim for refund was filed because it was on the wrong form, according to my recollection. The letter of June 16, 1920, included in Exhibit "D" of Plaintiffs' "Exhibit 1", is a copy of letter which was attached to the refund claim filed on July 2, 1920.

The witness Frank M. McDonnell was then excused.

Petitioners' counsel then announced that the petitioners rested.

Thereupon the following documents were introduced in evidence by the defendant:

Defendant's Exhibit A. (Exhibit "A" consists of a letter admitted to have been written by the Trumble Refining Company by A. J. Gutzler to David Burnett, Deputy Commissioner of Internal Revenue on August 5, 1930, to which the following objection was interposed by plaintiffs through their counsel:

Mr. Mackay: I object to it as irrelevant and immaterial.

(Objection was over-ruled and exception allowed by the Court.)

DEFENDANT'S EXHIBIT A

"TRUMBLE REFINING COMPANY
756 Subway Terminal Bldg.
Los Angeles, Calif.

(Not nec. to ack.
(Left in person,
IT:E:RRR

August 5, 1930

"Mr. David Burnett,
Deputy Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

"Replying to your letter of May 22, 1930, File IT:AR:G–4 TCC, with reference to claims for refund filed by the Trumble Refining Company for the years 1913 to 1918 inclusive and for the years 1920 to 1924 inclusive, wish to advise as follows:

"Regarding the calendar year 1917, for which under date of April 24, 1929, we filed claim for refund for $17,764.08 having adjusted the deduction for depreciation of license agreements in line with decision rendered by the United States Board of Tax Appeals in Dockets Nos. 11763, 117492, 26434 and 32151, wherein we were allowed a March 1, 1913 value of $850.00 on certain license agreements for depreciation purposes resulting in an annual deduction of $72,511.90, based upon an average life of eleven years, eight months and twenty days as of March 1, 1913. We wish to inform you regarding the year 1917 that under date of June 17, 1920 we filed a

claim for refund for $9,749.80. The original return filed for the year 1917 showed a tax liability of $11.870.68, which was paid on the quarterly payment dates in 1918. The original return included no allowance or deduction for depreciation of royalty contracts, so that on June 17, 1920 this company filed a claim on Form 46, attaching an amended return which included a deduction of $54,-121.42 for depreciation of royalty contracts resulting in a tax liability for the year of $2,120.66 and claiming a refund of the difference, or $9,749.80. This claim Commissioners No. 78180 was rejected by the Commissioner under date of December 13, 1921.

"Under date of February 21, 1920 the Commissioner proposed an additional tax for the year 1921 of $6,365.00 and assessment was made of this tax plus interest of $1,082.05, or $7,447.05 on January 13, 1922. Claim for abatement of additional taxes was rejected and tax of $6,365.00 plus interest of $1,646.36 less overassessment #308,813 for $151.17, or $7,860.19 was paid on May 22, 1923.

"We contend that the refund claim filed by this company under date of June 17, 1920 was within the statutory period and that this claim should be reopened in accordance with provisions of Treasury Decision No. 4235 providing for the reopening of claims previously rejected under certain conditions, one provision of which reads as follows:

"'A refund or credit is properly allowable under a Court decision or a decision of the Board of Tax Appeals

to which the appellant was a party and the adjustment in accordance therewith requires a compensating adjustment (such as an adjustment in inventory or invested capital or the shifting of an item of income or loss from one taxable period to another) for one or more other taxable periods, and the applicant requests the re-opening of the case for such other taxable periods.'

"We attached herewith statement showing the amount of tax due for the year 1917 after giving *a*ffect to proper depreciation deduction in accordance with the decision of the Board in the heretofore mentioned cases; also taking credit for tax and interest paid covering this year, which results in a refund to this company of $17,764.08 plus interest thereon as provided by law.

"We, therefore, respectfully request a re-opening of this claim and refund made in accordance with revised tax liability for this year.

Yours truly,

TRUMBLE REFINING COMPANY

By A. J. GUTZLER,

Secretary"

Defendant's Exhibit B. (Defendant's Exhibit "B" consists of a reply to Exhibit "A" and bears date of November 3, 1930.) The introduction of this in evidence was objected to by the plaintiffs on the ground that it was irrelevant and immaterial. The objection was overruled and exception allowed by the Court.

DEFENDANT'S EXHIBIT B

"November 3, 1930

IT:E:RRR
"Trumble Refining Company,
756 Subway Terminal Building,
Los Angeles, California.

Sirs:

"Reference is made to your letter dated August 5, 1930, in which you request the reopening of a 1917 claim for refund of income and excess profits taxes which was rejected in Bureau letter dated December 13, 1921.

"The request for reopening is based on a decision of the United States Board of Tax Appeals covering subsequent years, in which you were allowed an annual deduction for depreciation of certain license agreements.

"From the record it is observed that the Commissioner has not acquiesced in the above-mentioned decision. It is also noted that more than five years have elapsed from the date the taxes were paid, and since the claim for refund was rejected on December 13, 1921, reopening of the claim is specifically precluded by Treasury Decision 4235 which prohibits the reopening of any claim for refund which was disallowed prior to May 29, 1928, and on which the period for bringing suit in court has expired unless a request for reopening was filed on or before January 31, 1929.

Respectfully,

Deputy Commissioner.

ALS"

Counsel for the plaintiffs then offered and were by the Court granted leave to file the following amendment to the First Amended Petition with the expressed understanding that the allegations in said amendment were by agreement of counsel and order of the Court deemed denied by the defendant:

"(Title of Court and Cause)

"MOTION TO AMEND FIRST AMENDED PETITION

"Come now the plaintiffs in the above entitled action and move this Honorable Court for permission to amend Paragraph V of the First Amended Petition filed hereby by adding to said paragraph the following:

"That the Trumble Refining Company never made application for an assessment under Section 210 and never acquiesced in the Commissioner's determination that the assessment should be made under this provision; that the action of the Commissioner of Internal Revenue and defendant in determining the tax liability of Trumble Refining Company for the year 1917 under the provisions of Section 210 of the Revenue Act of 1917 was erroneous and illegal.

(signed) THOMAS R. DEMPSEY
Thomas R. Dempsey

(signed) A. CALDER MACKAY
A. Calder Mackay

Attorneys for Plaintiffs"

Plaintiff's counsel then announced that plaintiffs rested and moved for judgment on the record.

Defendant then filed the following written motion for judgment:

"(Title of Court and Cause)

"MOTION FOR JUDGMENT

"Comes now the defendant, by and through its attorneys, Peirson M. Hall, United States Attorney for the Southern District of California, E. H. Mitchell, Special Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney for the Treasury Department, and moves the Court for judgment in behalf of the defendant on the ground and for the reason that there is no substantial or sufficient evidence before the Court upon which to base a judgment for the plaintiff.

"Dated this 2nd day of February, 1937.

.....

PEIRSON M. HALL,
U. S. Attorney

.....

E. H. MITCHELL,
Special Assistant U. S. Attorney.

.....

EUGENE HARPOLE,
Special Attorney for the Treasury Department."

Both the motions of plaintiffs and of defendant for judgment were denied by the Court and exceptions allowed.

A. Calder Mackay, appearing as attorney for the plaintiffs, then proceeded with oral argument on behalf of the plaintiffs' case. Eugene Harpole, appearing as attorney for the defendant, then responded to the arguments advanced in behalf of the plaintiffs and questions propounded by the Court.

At 5:05 o'clock P. M. on February 2, 1937 an adjournment of Court was taken until 10:00 o'clock A. M. Wednesday, February 3, 1937.

Upon the reconvening of Court on February 3, 1937 argument on behalf of the defendant was resumed by Eugene Harpole. He was followed by A. Calder Mackay, who advanced further argument in favor of the plaintiffs' case.

The Court then, with the consent of counsel, reopened the case for the introduction of further documentary evidence.

Thereupon the following exhibits were introduced in evidence by the plaintiffs and defendant, respectively:

Plaintiffs' Exhibit No. 6. (Exhibit No. 6 consists of the deficiency notice issued to Trumble Refining Company covering the year 1918.)

PLAINTIFFS' EXHIBIT 6

"Treasury Department
Washington

Office of
Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue
and refer to
IT:E:SM
RLC–A–6566

November 6, 1924

"Trumble Refining Company of Arizona,
312 Union League Building,
Los Angeles, California.

Sirs:

"An audit of your income and profits tax return for the taxable year 1918 has resulted in the determination of a deficiency in tax of $27,775.11 as shown in the attached statement.

"In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed sixty days from the date of this letter within which to file an appeal to the

Board of Tax Appeals contesting in whole or in part the correctness of this determination.

"Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the sixty days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

"If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM–RCL–A6566. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner,

by J. G. BRIGHT,
Deputy Commissioner.

Enclosures:
Statements
Agreement – Form A

"STATEMENT

"IT:E:SM
RLC–A–6566

In re: Trumble Refining Company of Arizona,
312 Union League Building,
Los Angeles, California.

		Deficiency
"1918	(Waiver filed)	$27,775.11

"You are advised that the Committee on Appeals and Review in Recommendation Number 8766 dated July 14, 1924 has sustained the action of the Income Tax Unit in allowing your application for assessment under the provisions of Section 328 of the Revenue Act of 1918.

"The recommendation as approved states in substance that the Committee has reached the conclusion that the value as of March 1, 1913 of the interest in the patents undisposed of by appellant in 1915 was not more than $160,000.00 and the recommendation accordingly is made that the appellant be permitted to amortize the value of his interest in the patents over their remaining average life from March 1, 1913, namely fifteen years.

"The Committee finds in connection with the second question presented that the comparatives selected by the unit meet all the requirements specified in Section 328 of the Act and that the resulting rate of profits tax to net

income is equitably alike to the Government and to the taxpayer.

"In accordance with the above, your net income has been adjusted and the tax computed as follows:

Net income previously determined			$71,415.79
Less: Amortization of patents allowed by the Committee on Appeals and Review, Recommendation #8766 (1/15 of $160,000.00)			10,666.67
Corrected net income			$60,749.12
Profits tax under Section 328			$24,936.07
Net income		$60,749.12	
Less: Profits tax	$24,936.07		
Exemption	2,000.00	26,936.07	
Balance taxable at 12%		$33,813.05	4,057.57
Total tax assessable			$28,993.64
Original tax assessed, account #50011			1,218.53
Additional tax assessable			$27,775.11"

Defendant's Exhibit C. (Exhibit "C" consists of a memorandum of the Income Tax Unit dated January 14, 1924, and a letter of transmittal.)

DEFENDANT'S EXHIBIT C

"January 14, 1924

"IT:E:SM
RIB-A-6566

"Trumble Refining Company of Arizona,
c/o E. P. Adams,
312 Union League Building,
Los Angeles, California.

Sirs:

"The appeal of the Trumble Refining Company of Arizona, dated November 17, 1923, from the findings of the Income Tax Unit in respect to its returns for the year 1918, has been transmitted to the Committee on Appeals and Review.

"In accordance with Treasury Decision 3492, there is attached a copy of the transmittal letter.

Respectfully,

(signed) J. G. BRIGHT
Deputy Commissioner.

Enclosure:
Copy of Letter.
GDS-5

"IT:E:SM
RIB/A–6566

"FROM: Special Assessment Section, Income Tax Unit.

"TO: Committee on Appeals and Review.

"CASE OF: Trumble Refining Company of Arizona, Los Angeles, California.

"STATEMENT:

Year under audit	–	1918
Additional tax	–	$33,107.97
Claims	–	None.

"ISSUES: (1) Disallowance of depreciation on royalty contracts.

(2) Computation of the profits tax under Section 328 of the Revenue Act of 1918.

"FACTS: (1) Appellant was incorporated in 1910, to take over two patents, known as Trumble Evaporator for Petroleum and Trumble Oil Separator, a purifier. Letters patent were issued July 4 and September 5, 1911, respectively. Stock was issued for these patents and some stock was sold for cash. It is attempted by the taxpayer to establish a March 1, 1913 value, based upon anticipated earnings

from the contracts. All the patents were sold in April, 1915, for one million dollars, the company retaining some seventeen royalty contracts made at various dates, from January, 1911 to July, 1913, based upon these patents sold. The alleged value of these contracts was set up by deducting the one million received from the sale of patents from the alleged March 1, 1913 value of patents and patent right. It is this latter sum which taxpayer now claims is depreciable.

"TAXPAYER'S CONTENTION: (1) Taxpayer's contention is that royalty rights under patents disposed of in 1915, are depreciable. The contention is based upon the first paragraph in A. R. M. 35, which is the case of A, assigning American patents to a foreign corporation, and retaining forty per cent interest in the profits therefrom. The Committee held that A had a depreciable interest in the patents.

"UNIT'S CONTENTION: (1) The Unit cannot concede the contention of the taxpayer, either as to the March 1, 1913 value of the patents or the contention that royalty rights, such as are present in the taxpayer's case, are depreciable. The representative's attention was called to A. R. M. 35, which states that the value of patents should be segregated and each depreciated on its own life. Segregation, it is said, cannot be done in the present case. The taxpayer's case is not analagous to that cited in A. R. M. 35, as, in this case under consideration, taxpayer retains no interest in the earnings from assigned patents.

"FACTS: (2) The entire gross income of this corporation is derived from royalties on the use of patented oil refining apparatus. The contracts require occasional inspection of the apparatus in use and supervising of the installation of new apparatus. The Revenue Agent reduced invested capital to $380.70, the March 1, 1913, value of the patent rights not being determin-

able. The tax liability was computed under Section 328 and the taxpayer notified by registered letter of October 17, 1923.

"TAXPAYER'S CONTENTION: (2) It is contended that insufficient relief has been given by the computation of the tax under Section 328.

"UNIT'S CONTENTION: (2) The comparatives shown on the data sheet are quite similar in all important respects to the appellant and derive their income from similar sources. Since the comparatives appear suitable and the rate determined thereby not excessive for 1918, the Unit cannot concede the taxpayer's contention.

"CONFERENCES: November 20 and 21, 1923.
Issues (1) and (2) considered.
A copy of this letter of transmittal is being forwarded to the taxpayer in accordance with Treasury Decision 3492.

Deputy Commissioner.

AJS–1"

Defendant's Exhibit D. (Exhibit "D" consists of an appeal to the Commissioner of Internal Revenue by Trumble Refining Company in the form of letters dated November 3 and November 17, 1923, respectively.)

DEFENDANT'S EXHIBIT D

"TRUMBLE REFINING CO.
Higgins Building
Second & Main
Los Angeles, California.

November 3, 1923.

"Commissioner of Internal Revenue,
Washington, D. C.

Attention: IT:E:SM:RIB–A–6566–APP

Sir:

"Reference is made to your letter (file reference as above) dated October 17, 1923, in which letter we are advised of the proposed assessment of an additional income and profits tax of $33,107.97 for the year 1918.

"Protest is hereby entered to the assessment of this tax and request made for a conference with the Income Tax Unit on November 20, 1923, on which date our representative, Mr. E. P. Adams, will be in Washington.

"This protest and request for a conference is not made for the purpose of delay, but solely for the reconsideration of the points at issue and an opportunity to present in detail the facts in connection with this taxpayer's contentions on the following:

1. Disallowance in part of the Salaries paid to Officers.
2. Disallowance of depreciation of patents.
3. Computation of War and excess profits taxes.

"Please address any communication relative to the conference to E. P. Adams, Raleigh Hotel, Washington, D. C.

Respectfully,

TRUMBLE REFINING COMPANY OF ARIZONA
By A. J. GUTZLER,
Secretary.

RECEIVED
Nov. 8 PM.
Spec. Corres. Cont.
No. 102519

"Subscribed and sworn to before me this third day of November, 1923.

(SEAL) PEARL TRALLE
Notary Public in and for the County of Los Angeles, State of California."

"E. P. ADAMS
Public Accountant
and
Tax Consultant

Suite 312, Union League Building
Los Angeles

Washington, D. C.
November 17, 1923.

: RECEIVED :
: Nov. 21, 1923 :
: Special Assessment Section :

"To the Commissioner of Internal Revenue,
Washington, D. C.

In re: IT:E:SM:RIB–A–6566–App.
Trumble Refining Company, of Arizona,
Higgins Buildings,
Los Angeles, California.

Sir:

"Reference is made to your letter (File Reference as above) dated October 17, 1923, and reply thereto, dated November 3, 1923.

"In the letter dated November 3, 1923, the taxpayer entered a protest to the assessment of an additional in-

come and profits tax for the year 1918 of $33,107.97 and enumerated the findings of the Income Tax Unit to which exceptions were taken. Request was made in such letter for a conference on November 20, 1923, with Income Tax Unit, at which time oral presentation could be made of the taxpayer's contentions.

"As a matter of record and in accordance with the provisions of T. D. 3492, appeal is hereby entered to the Commissioner of Internal Revenue for a review of the decisions of the agencies of the Bureau of Internal Revenue and the taxpayer's contentions relative thereto. Such appeal is to be transmitted by the Income Tax Unit to such agency as may be designated by the Commissioner of Internal Revenue, in the event the taxpayer and the Income Tax Unit fail to reach an agreement on the points at issue.

Respectfully,

TRUMBLE REFINING COMPANY OF ARIZONA

By E. P. ADAMS

Attorney in Fact.

"Subscribed and sworn to before me this 17th day of November, A. D. 1923.

ELIZABETH C. MONAHAN

Notary Public, D. C."

The foregoing constitutes all of the evidence introduced by the plaintiffs and the defendant. It was then ordered by the Court that the case stand submitted for decision.

Thereafter, and on the first day of March, 1937, the Court entered the following Minute Order:

"(Date and Title of Court and Cause)

"This cause having heretofore been heard by the Court on evidence both oral and documentary, and counsel having argued the cause and submitted written briefs and the Court having duly considered the same and being fully advised as to the facts and the law, now hands down its written opinion and finds in favor of the plaintiffs. Counsel for plaintiffs to prepare findings and judgment incorporating therein an exception to the defendant."

and filed the following memorandum of its Conclusions:

"(Title of Court and Cause)

"MEMORANDUM OF CONCLUSIONS
(Judge Hollzer, March 1, 1937)

"It appearing that the Trumble Refining Company, a dissolved corporation of which the plaintiffs are trustees, on or about March 15, 1918 filed its income and profits tax return for the year 1917, that thereafter, and on or about June 17, 1920, said Trumble Refining Company filed an amended income tax return for the year 1917, that thereafter and on or about July 21, 1920 said Company filed its claim for refund demanding the return to it, on account of over-payment of taxes by it for the year 1917, of the sum of $9,749.80, that at the same time, and as part of the same demand, said Company filed a claim for abatement in the sum of $6,365.00 theretofore determined by the Commis-

sioner of Internal Revenue as the amount of additional taxes owing by said Company for the year 1917; and

"It further appearing that in the year 1921, the Commissioner of Internal Revenue caused an investigation to be made in the matter of said amended return, also said claim for refund and said claim for abatement, that thereafter and under date of December 13, 1921 the Commissioner advised said Company that its claim for refund and its claim for abatement would be rejected, that thereafter and on or about February 1, 1922 said Company filed with the Commissioner a comprehensive brief, of which plaintiffs' Exhibit '3' is a copy, that said brief was prepared by said Company's tax consultant and dealt with the subject matter of assessment of Federal taxes against it for the years 1917-1920, inclusive, that in and by said brief said Company protested against proposed additional taxes for each of said last mentioned years, that the principal contention discussed in said brief, and the one which said company asserted was applicable to, and affected alike each of the years 1917-1920 inclusive, was its contention that it was entitled to an annual deduction of $54,121.42 from income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements, that pages 49 and 50 of said brief, being a portion of Exhibit 'H' attached to said brief, contained a computation of Federal taxes for the year 1917 and, among other items, purported to show and to claim that the normal Federal tax due from said Company for the year 1917 amounted to the sum of $2,091.59 also that it had paid a Federal tax for that year amounting to the sum of $11,870.68 and that there was a refund due to said Company for that year amounting to the sum of $9,679.09; and,

"It further appearing that on December 9, 1922, said Company's tax consultant conferred with one of the officials of the Bureau of Internal Revenue, said official being then in charge of its special audit section, that at said conference said Company's tax consultant requested a hearing on the subject of said Company's taxes for the years 1917 to 1920 inclusive, that said official responded that said Bureau was not yet ready to take up the matter of the Company's taxes for all of those years but would hold in abeyance the consideration of the taxes for 1917 until said Company's taxes for the remaining years could also be reviewed, that at the rquest of said official said Company thereafter, and on or about February 1, 1923, filed with the Commissioner an Income and Profits Tax Waiver, being an unlimited waiver of the Statute of Limitations governing the time within which the Commissioner could make additional assessments to taxes against said Company for the year 1917; and

"It further appearing that thereafter and on February 5, 1923 the Commissioner notified said Company that its taxes had been redetermined for the year 1917 with the result that there appeared to be an over-assessment in the amount of $151.17, that thereafter and under date of February 23, 1923, and in response to said notice, said Company wrote to the Commissioner calling attention to its said brief, aforementioned, and also calling attention to the aforementioned conference had by its tax consultant with an official of the Bureau on December 9, 1922, at which conference request had been made for a joint consideration of all the years involved at a hearing to be held in Washington, and in said response said Company also requested that under these conditions further action be with-

held in the matter of entering an over-assessment for 1917; and

"It further appearing that on or about May 15, 1923 said company telegraphed the Commissioner that, in view of the understanding reached at said conference held December 9, 1922, and because questions involved in 1917 affected all years, he should instruct the local Collector of Internal Revenue to withhold collection of additional taxes assessed for 1917, and that the Commissioner should fix a date for a conference at which all years might be considered, that thereafter and in response to said Company's telegram, the Commissioner, on or about May 21, 1923, telegraphed said Company as follows:

" 'Reply telegram fifteenth No authority to instruct Collector Accept abatement claim to replace claim rejected Conference may be arranged on nineteen seventeen case if formal protest is filed but is impracticable on later years until information submitted is considered and audit completed.'

and

"It further appearing that thereafter, in the early part of May, 1924, said Company's tax consultant, acting on its behalf, held a conference with an official of the Commissioner's office, that at said conference said Company's representative delivered to said official a brief of which plaintiffs' exhibit '4' is a copy, wherein said Company protested against the decisions of the Income Tax Unit on which assessment of additional taxes had been made for 1917 and was proposed for 1918 and subsequent years, that in said brief additional arguments were presented in support of said Company's contention that it was entitled to the

previously claimed annual deduction from income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements, that at said last mentioned conference said Company's representative discussed with said official said Company's contentions respecting taxes as to all of said years, that during said conference said official had before him a file containing documents pertaining to said Company's taxes for all of said years, that among such documents then in the hands of said official were said briefs filed on behalf of said Company in February, 1922 and May, 1924, respectively, and also the Revenue Agent's report upon which additional assessments had been proposed to be made against said Company; and

"It further appearing that on or about May, 1923, said Company paid under protest to the local Collector of Internal Revenue the sum of $6,365.00 plus accrued interest, on account of additional taxes assessed against it for the year 1917; and

"It further appearing that in the year 1924 the Committee on Appeals and Review of the Commissioner's office considered the subject matter of the assessment of additional taxes against said Company and thereafter recommended to the Commissioner that the March 1, 1913 value of said patent license agreements be fixed at the sum of $160,000.00 and that amortization be allowed to said company on the basis of such valuation, that thereupon said recommendation was adopted by the Commissioner; and,

"It further appearing that thereafter appeals were taken by said Company to the United States Board of Tax Appeals with respect to said Company's taxes for the years 1918 and 1920 to 1923 inclusive, that thereafter and on or

about November 19, 1928 said Board rendered its decision, holding in effect that said Company, on March 1, 1913, was the owner of patent license agreements having a value of $850,000.00 and further holding that said company was entitled to deduct from income annually the sum of $72,511.90 on account of depreciation and exhaustion of the value of said agreements, that no appeal was taken from said decision of said Board; and

"It further appearing that on about April 25, 1929 said Company filed with the Commissioner its revised claim for refund in the sum of $17,764.08, on account of taxes, plus interest thereon, paid for the year 1917, said claim being computed in conformity with the aforementioned decision of the Board of Tax Appeals, that thereafter and under date of May 22, 1930, the Commissioner notified said Company in substance to the effect that for the years 1920, 1922 and 1923 the deduction for depreciation of license agreements in the amount of $72,711.80 had been allowed in the adjudication of its tax liability for each of those years in accordance with said decision of said Board, also that said Company's claims for refund for the years 1913, 1914, 1915, 1916 and 1919 were barred by the statute of limitations, that since no tax was paid for any of said last mentioned years within four years of the filing of the claim the statute of limitations had run and no refund could be made for those years, and that since the Commissioner had not acquiesced in said decision of said Board with respect to the March 1, 1913 valuation of said license agreements for depreciation purposes, said Company's contention could not be allowed for those years which were not pending before said Board, namely, 1913 to 1917 inclusive, and 1919; and

"It further appearing that in his letter to said Company, under date of November 3, 1930, said Commissioner for the first time stated or took the position in his negotiations with said Company to the effect that re-opening of its claim for refund on account of 1917 taxes was prohibited and that the period for bringing suit thereon had expired; and

"It further appearing that at all times from and after June 17, 1920 said Company in its negotiations and dealings with the Commissioner took the position that it was entitled annually to deduct a similar amount from income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements, such annual deduction being claimed to be in excess of the sum of $54,000.00; and

"It further appearing that said Company at no time requested or acquiesced in a redetermination of its income and excess profits taxes for 1917 in accordance with the provisions of Section 210 of the Revenue Act of October 3, 1917;

"THE COURT CONCLUDES that subsequent to the original rejection of said Company's first claim for refund and first claim for abatement, that is to say, that subsequent to December 13, 1921 and prior to February, 1923, and that likewise subsequent to February, 1923, the Com-

missioner re-opened and continued to give further consideration to said Company's claims and contentions respecting taxes paid and also respecting additional taxes proposed to be assessed for the year 1917, that said Company's claims and contentions respecting such taxes were still pending before and under consideration by the Commissioner on the date, to-wit, on or about April 25, 1929, when said Company filed its revised claim for refund, and that said Company's claims and contentions respecting such taxes were finally passed upon and determined by the Commissioner when he rejected said revised claim.

"THE COURT FURTHER CONCLUDES that the claim herein sued upon was filed within the time allowed by law.

"THE COURT FURTHER CONCLUDES that it has jurisdiction to hear and determine this proceeding.

"THE COURT FURTHER CONCLUDES that plaintiffs are entitled to recover on the basis of allowing a deduction from its 1917 income of the sum determined by the Board of Tax Appeals to be a proper deduction on account of annual depreciation and exhaustion of the value of its license agreements.

"Counsel for plaintiffs are requested to prepare and serve findings and judgment in conformity with this memorandum incorporating in the said judgment an exception in favor of defendant.

"(See: Staton vs US, 9 F Supp 428;

Pierce-Arrow Motor Car Co. vs US, 9 F Supp 577;

American Safety Razor Corp. vs US, 6 F Supp 203;

McKeever v. Eaton, 6 F Supp, 697;

Obis*b*o Oil Co. vs Welch, etc., 85 F (2d) 860)"

On May 4, 1937 the defendant prepared, served and filed the following written Motion for Arrest of Judgment and Memorandum of Authorities in support thereof:

"(Title of Court and Cause)

"MOTION FOR ARREST OF JUDGMENT AND FOR DISMISSAL OF THE ACTION.

"Now on this 4th day of May, 1937, comes the United States of America, by its attorneys, Peirson M. Hall, United States Attorney for the Southern District of California, E. H. Mitchell and Alva C. Baird, Assistant United States Attorneys for said District, and Eugene Harpole, Special Attorney for the Treasury Department, and moves that Judgment in the above-entitled cause be arrested as to it and the action dismissed upon the following grounds, and for the following reasons:

I.

"By reason of the pleadings and upon the record upon which the case is submitted the plaintiff is not, as a matter of law, entitled to recover the whole, nor any part of the sum sued for herein.

II.

"That this Court has no jurisdiction of the subject matter of this action, the tax sought to be recovered having been assessed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917.

"Dated this 4th day of May, 1937.

.....

PEIRSON M. HALL,
United States Attorney

.....

E. H. MITCHELL,
Asst. U. S. Attorney

.....

ALVA C. BAIRD
Asst. U. S. Attorney

.....

EUGENE HARPOLE,
Special Attorney for the Treasury Department."

"(Title of Court and Cause)

"MEMORANDUM OF POINTS AND AUTHORITIES

I.

"The taxes involved in this action were assessed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917.

II.

"The grant of Special Assessment and the ascertainment of the rate of tax to be applied to the net income of the taxpayer are indissolubly connected by the terms of the statute. The exercise of the discretion of both aspects is committed to the Commissioner and to the Board of Tax Appeals upon review of his action. That discretion can not be reviewed by the Courts nor exercised by them in place of the administrative officer designated by law. It is beyond the power of a Court to exercise the Commissioner's function of finding that Special Assessment should be accorded, and equally so to substitute its discretion for his as to the factors to be used in computing the tax. The taxpayer's net income is an essential factor in the problem. Heiner v. Diamond Alkali Company, 53 S. Ct. 513, reversing the Circuit Court of Appeals for the Third Circuit, 60 Fed. (2d) 505, which affirmed the District Court, 39 Fed. (2d) 645; Williamsport Wire Rope Company v. United States, 48 Sup. Ct. 587, 6 A. F. T. R. 7797, affirming United States Court of Claims 63 Ct. Cls. 463; Galen

H. Welch v. Obispo Oil Company, Supreme Court of the United States No. 602, decided April 26, 1937, not yet officially reported (Par. 1338, Prentice-Hall Tax Service, report of April 29, 1937), reversing the Circuit Court of Appeals for the Ninth Circuit, 85 Fed. (2d) 860, which affirmed the District Court for the Southern District of California in Obispo Oil Company v. Welch, No. 3334-J, 15 A. F. T. R. 1002. See also Clinton Corn Syrup v. United States, 67 Ct. Cls. 711 (Cer. Den., 50 Sup. Ct. 33); and Feilbach Company v. Niles, 21 Fed. (2d) 495. (See Paragraph XII, Stipulation of Facts.)

PEIRSON M. HALL,
United States Attorney

E. H. MITCHELL,
Asst. U. S. Attorney

ALVA C. BAIRD,
Asst. U. S. Attorney

EUGENE HARPOLE,
Special Attorney for the Treasury Department."

Thereafter, and on the 1st day of June, 1937 the plaintiffs prepared and presented to the Court Special Findings of Fact and Conclusions of Law together with a request for the adoption of the same in the words and figures as follows:

"(Title of Court and Cause)

"REQUEST BY PLAINTIFFS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

"Come now the plaintiffs above named and hereby request the Court, that in rendering and making its judgment in the above entitled cause, which has been submitted to the Court, said Court make specific Findings of Fact and Conclusions of Law upon the issue included in said cause, as set forth in the proposed Findings of Fact and Conclusions of Law hereto attached.

"Dated: June 1, 1937.

THOMAS R. DEMPSEY
Thomas R. Dempsey

A. CALDER MACKAY
A. Calder Mackay

Attorneys for Plaintiffs.

"Not approved as to form as provided by Rule 44 because of decision of Supreme Court in Obispo Oil Company case.

PEIRSON M. HALL
United States Attorney

E. H. MITCHELL
Assistant United States Attorney

EUGENE HARPOLE
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

"FINDINGS OF FACT

I.

"That the defendant, the United States of America, was, during all times material to this action, and still is, a sovereign body politic.

II.

"That the Trumble Refining Company was incorporated under the laws of the State of Arizona on or about July 13, 1910, and existed as a corporation until on or about March 24, 1930. That the said Trumble Refining Company was duly and regularly qualified to do business in the State of California and its principal place of business was located at Los Angeles, California. That on or about March 24, 1930 said Trumble Refining Company was duly and regularly dissolved and plaintiffs are now duly appointed, qualified and acting trustees in dissolution of said corporation and are empowered and entitled to institute and maintain causes of action for and on behalf of said Trumble Refining Company.

III.

"That the Trumble Refining Company within the time allowed by law and prior to April 20, 1918, filed with the then Collector of Internal Revenue, John P. Carter, its income and excess profits tax return for the year 1917 wherein it disclosed a gross income of $97,503.11, deductions of $8,033.57 and a net taxable income of $89,469.54, which resulted in a tax liability, computed under Section 209 of the Revenue Act of 1917, of $11,870.68, which on June 14, 1918 was paid to the said Collector of Internal Revenue. In determining its net taxable income as shown

on said return Trumble Refining Company inadvertently failed and neglected to take as a deduction from its gross income the exhaustion sustained upon its patent license agreements.

IV.

"That the said Trumble Refining Company from the time of its inception to and including the year 1917 was the owner and in possession of certain patent license agreements which on March 1, 1913 had a fair market value of $850,000.00 and a remaining useful life from March 1, 1913 of eleven years, eight months and twenty days, and was therefore entitled, in the determination of its net taxable income, to an annual deduction of $72,511.90, for the exhaustion of said patent license agreements. That the Trumble Refining Company's net taxable income for the year 1917 was the sum of $16,957.64.

V.

"That the invested capital of the Trumble Refining Company for the year 1917, as computed under the provisions of Section 207 of the Revenue Act of 1917, is the sum of $67,760.17.

VI.

"That by letter dated February 21, 1920 the Commissioner of Internal Revenue proposed additional taxes against the Trumble Refining Company in the sum of $6,365.00 which was assessed on May 17, 1920; in said letter of February 21, 1920 the Commissioner advised the Trumble Refining Company that in his opinion its business was of such a character as normally to require a substantial capital investment and the income was attributable to the employment of capital, and that therefore the tax lia-

bility of Trumble Refining Company could not properly be determined under the provisions of Section 209 of the Revenue Act of 1917; in said letter the Commissioner furthermore advised the Trumble Refining Company that in his opinion a large part of the Trumble Refining Company's invested capital could not be included under the statutory requirements for tax purposes and that therefore he had computed the tax under the provisions of Section 210 of the Revenue Act of 1917. That the additional taxes of $6,365.00 so computed by the Commissioner were based upon a net income of $89,469.54 – the net income reported by the Trumble Refining Company in its original return, which was erroneously computed without allowance for the exhaustion of its patent rights.

VII.

"That thereafter and on or about June 17, 1920 the Trumble Refining Company filed an amended income tax return for the year 1917 wherein it claimed a deduction for the exhaustion of its patent license agreements in the sum of $54,121.42 based upon a March 1, 1913 value of $811,-821.36 and wherein it disclosed a tax liability of only $2,120.88. That as a part of said amended return the Trumble Refining Company on or about July 2, 1920 filed its claim for refund demanding the return to it on account of overpayment of taxes by it for the year 1917 of the sum of $9,749.80, and at the same time and as a part of said demand said company filed a claim to abate the assessment of $6,365.00 theretofore determined by the Commissioner of Internal Revenue as the amount of additional taxes owed by said company for the year 1917.

VIII.

"That during August, 1921, the Commissioner of Internal Revenue through his Internal Revenue Agent at Los Angeles caused an investigation to be made in the matter of said amended return, said claim for refund and said claim for abatement, and as a result of such investigation additional taxes for the years 1917, 1918, 1919 and 1920 were proposed; that thereafter and under date of December 13, 1921 the Commissioner of Internal Revenue advised the Trumble Refining Company that its claim for refund and its claim for abatement would be rejected.

IX.

"That on or about January 13, 1922 a demand for the payment of said additional income and excess profits taxes of $6,365.00 covered by the aforementioned claim for abatement and the Commissioner's letter dated February 21, 1920, together with accrued interest of $1,082.05 aggregating $7,447.05, was made upon the Trumble Refining Company by the Collector of Internal Revenue for the Sixth Collection District of California. That on or about January 21, 1922 a second claim for abatement was filed with the Collector of Internal Revenue for the Sixth Collection District of the State of California in the sum of $7,447.05.

X.

"That on or about February 1, 1922 the Trumble Refining Company filed with the Commissioner of Internal Revenue a comprehensive brief and formal protest against the proposed additional taxes as set forth in the Revenue Agent's report dated August 17, 1921 for the years 1917 to 1920, inclusive, which brief and protest were prepared

by said company's tax consultant, dealing with the subject matter of assessment of Federal taxes against it for the years 1917 to 1920, inclusive; that in and by said brief said company protested against the proposed additional taxes for each of the last mentioned years; that the principal contention discussed in said brief, and the one which said company asserted was applicable to, and affected alike each of the years 1917 to 1920, inclusive, was its contention that it was entitled to an annual deduction of $54,-121.42 from income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements; that said brief contained, among other things, a computation of Federal income taxes for the year 1917, and also showed and claimed that the total tax due the United States Government from the Trumble Refining Company for the year 1917 amounted to the sum of $2,091.59 and that it had paid a Federal tax for that year amounting to $11,870.68, and that there was a refund due to said company for said year of $9,679.09.

XI.

"That on December 9, 1922 the Trumble Refining Company's income tax consultant, Mr. E. P. Adams, conferred with one of the officials of the Bureau of Internal Revenue, said official being then in charge of the Special Audit Section; that at said conference said company's tax consultant requested a hearing on the subject of said company's taxes for the years 1917 to 1920, inclusive; that said official responded that said Bureau of Internal Revenue was not yet ready to take up the matter of the company's taxes for all of those years but would hold in abeyance the consideration and final determination of the tax liability for 1917 until said company's taxes for the remaining years could

also be reviewed and finally determined. That at the request of said official, confirmed in writing by the Commissioner of Internal Revenue in a letter dated January 9, 1923, the Trumble Refining Company on or about February 1, 1923 executed and filed with the Commissioner of Internal Revenue an income and excess profits tax waiver, being an unlimited waiver of the statute of limitations governing the time within which the Commissioner could make additional assessments of taxes against said company for the year 1917.

XII.

"That on February 5, 1923 the Commissioner of Internal Revenue notified the Trumble Refining Company that its taxes for the year 1917 had been redetermined under the provisions of Section 210 of the Revenue Act of October 3, 1917 with the result that there appeared to be an overassessment of $151.17; that said proposed overassessment was based upon a net income of $88,727.83, which was erroneously computed without allowance for the exhaustion sustained on patent rights; that thereafter and under date of February 23, 1923 and in response to said notice said Trumble Refining Company wrote to the Commissioner of Internal Revenue calling attention to its said brief aforementioned and also calling attention to the aforementioned conference had by its tax consultant with an official of the Bureau on December 9, 1922, at which conference request had been made for a joint consideration of all the years involved at a hearing to be held in Washington, and in said response said company also requested that under these conditions further action be withheld in the matter of entering an overassessment for 1917 and also requested the privilege of filing additional data to

prove Trumble Refining Company's right to a substantial deduction for the exhaustion of its patent rights.

XIII.

"That on or about May 15, 1923 the Trumble Refining Company telegraphed the Commissioner of Internal Revenue that in view of the understanding reached at said conference held December 9, 1922 and because the questions involved for the year 1917 affected all years, he should instruct the local Collector of Internal Revenue to withhold collection of additional taxes assessed for 1917 and that the Commissioner should fix a date for a conference at which all years might be considered; that thereafter and in response to said company's telegram, the Commissioner, on or about May 21, 1923, telegraphed said company that he had no authority to instruct the Collector to accept abatement claim to replace the claim rejected, but that a conference might be arranged on the 1917 case if a formal protest were filed and that it was impracticable on later years until information submitted was considered and audit completed. That acting in conformity with the telegraphic instructions the income tax consultant of Trumble Refining Company in the early part of May, 1924 held a conference with an official of the Commissioner of Internal Revenue's office and at said conference said company's representative delivered to said official a brief and protest containing additional data to support its right to an annual deduction from its gross income for the exhaustion of its patent license agreements based upon the March 1, 1913 value thereof; that in said brief the Trumble Refining Company protested against the decisions of the Commissioner on which assessment of additional taxes had been made for the year 1917, and was proposed for 1918 and

subsequent years; that in said brief additional arguments were presented in support of said company's contention that it was entitled to the previously claimed annual deduction from income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements; that at said last mentioned conference said company's representative discussed with said official said company's contentions respecting taxes as to all of said years and that during said conference said official had before him a file containing documents pertaining to said company's taxes for all of said years; that among such documents then in the hands of said official were said income tax returns, claims for refund and briefs, which briefs were filed on behalf of said company in February, 1922 and May, 1924, respectively, and also the Revenue Agent's report upon which additional assessments had been proposed to be made against said company for the years 1917 to 1920, inclusive.

XIV.

"That on May 22, 1923 the Trumble Refining Company paid under protest to the then Collector of Internal Revenue Rex B. Goodcell the sum of $7,860.19 covering said additional taxes of $6,231.83 ($6,365.00 minus $151.17) and accrued interest thereon of $1,636.36.

XV.

"That on July 14, 1924 the Committee on Appeals and Review of the Commissioner's office considered the subject matter of the assessment of additional taxes against said company and thereafter recommended to the Commissioner that the March 1, 1913 value of said patent license agreements of Trumble Refining Company be fixed at the sum of $160,000.00 and that amortization be allowed to said

company on account of exhaustion of said patent license agreements on the basis of such valuation and that thereupon said recommendation was adopted by the Commissioner. That thereafter appeals were taken by the said Trumble Refining Company to the United States Board of Tax Appeals with respect to said company's taxes for the years 1918 and 1920 to 1923, inclusive, and thereafter and on or about November 19, 1928 the Board of Tax Appeals in the cases of Trumble Refining Company of Arizona, Docket No. 11763 involving the year 1918, Docket No. 17492 involving the years 1920 and 1921, Docket No. 26434 involving the year 1922 and Docket No. 32151 involving the year 1923, rendered its decision (reported in 14 B. T. A. page 348) holding that the Trumble Refining Company on March 1, 1913 was the owner and in possession of patent license agreements which on March 1, 1913 had a fair market value of $850,000.00 and a remaining useful life from March 1, 1913 of eleven years, eight months and twenty days, and was therefore entitled in the determination of its net taxable income to an annual deduction of $72,511.90 for the exhaustion and depreciation of the value of said patent license agreements; that on the 30th day of October, 1929, the United States Board of Tax Appeals entered its final order determining that the Trumble Refining Company was entitled to an annual deduction in the sum of $72,511.90 for exhaustion of its license agreements. That neither the Trumble Refining Company nor the plaintiffs took an appeal from the Board's decision and said decision became final.

XVI

"That on or about April 23, 1925 the Trumble Refining Company filed with the Commissioner of Internal Revenue its revised claim for refund in the sum of $17,764.08 on account of taxes, plus interest thereon, paid for the year 1917 as aforesaid, said claim being computed in conformity with the aforementioned decision of the Board of Tax Appeals. That the Commissioner of Internal Revenue in his letter dated May 22, 1930, sent to the Trumble Refining Company, referred to claims for refund of the Trumble Refining Company for the years 1913, 1914, 1915, 1916, 1917, 1919, 1920, 1922 and 1923. In said letter the Commissioner stated that all of the claims for said years were based upon the contention that the Trumble Refining Company was entitled to an annual deduction from income of $72,511.90 for depreciation of license agreements in view of the decision rendered by the United States Board of Tax Appeals for the years 1918, 1920, 1921, 1922 and 1923, Docket Numbers 11763, 17492, 26434 and 32151, wherein the Trumble Refining Company was allowed a March 1, 1913 value of $850,000.00 on certain license agreements for depreciation purposes resulting in an annual deduction of $72,511.90 based upon an average life of eleven years, eight months and twenty days as at March 1, 1913. In said letter the Commissioner of Internal Revenue advised the Trumble Refining Company that its claims for refund for 1920, 1922 and 1923 had been allowed in accordance with the decision of the United States Board of Tax Appeals; also that said company's

claims for refund for the years 1913, 1914, 1915, 1916 and 1919 were barred by the statute of limitations; that since no tax was paid for any of the last mentioned years within four years of the filing of the claim, the statute of limitations had run and no refund could be made; that since the Commissioner had not acquiesced in said decision of said Board of Tax Appeals with respect to the March 1, 1913 valuation of said license agreements for depreciation purposes, said company's contention could not be allowed for those years which were not pending before said Board, namely, 1913 to 1917, inclusive, and 1919. That the Commissioner's action in refusing to allow Trumble Refining Company a deduction of $72,511.90 from its gross income for 1917 in accordance with the decision of the Board of Tax Appeals and in refusing to allow the refund due as a result of such allowance was arbitrary.

XVII

"That the Commissioner of Internal Revenue in his letter to the Trumble Refining Company under date of November 3, 1930 for the first time stated or took the position in his negotiations with said Trumble Refining Company to the effect that a re-opening of its claim for refund on account of 1917 taxes was prohibited and that the period for bringing suit thereon had expired, and at no time did the Commissioner advise the Trumble Refining Company that its refund for 1917 could not be allowed because its taxes were properly computed under the provisions of Section 210 of the Revenue Act of 1917.

XVIII

"That at all times from and after June 17, 1920 the Trumble Refining Company in its negotiations and dealings with the Commissioner took the position that it was entitled annually to a deduction from its gross income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements, such annual deduction being claimed to be in excess of the sum of $54,000.00; that the Commissioner's rejection on December 13, 1921 of said company's original claim for refund was vacated and set aside, and said claim was re-opened and re-considered and was not rejected until May 22, 1930; that the Commissioner of Internal Revenue from the time the Trumble Refining Company filed its amended income tax return in June, 1920, disclosing that it had overpaid its taxes and was entitled to a refund for the taxes so overpaid, up to and until the date of the rejection of its revised claim considered the data and arguments submitted by the Trumble Refining Company and held in abeyance a final determination of the net taxable income of the Trumble Refining Company for the year 1917.

XIX

"That the Trumble Refining Company at no time requested or acquiesced in a determination of its excess profits taxes for the year 1917 in accordance with the provisions of Section 210 of the Revenue Act of October 3, 1917, and at all times material to this action protested the determination of its taxes under said section, and at all

times protested the Commissioner's determination that its net taxable income was $89,469.54 or $88,727.83 or any sum in excess of $16,957.64; that the Commissioner was adequately apprised prior to the making of his special assessments of various grounds upon which error was claimed in his computation of net income and tax; that the Commissioner never took the position that his special assessments concluded the matter but on the contrary kept the case open and kept on re-examining the factors essential to determine the net taxable income of Trumble Refining Company for the year 1917; that the Commissioner's determinations to assess Trumble Refining Company under the provisions of Section 210 of the Revenue Act of October 3, 1917 made by him in his letters of February 21, 1920 and February 5, 1923 were vacated and set aside and at no time has the Commissioner of Internal Revenue made a final determination that the Trumble Refining Company's income tax liability should be computed under the provisions of Section 210 of the Revenue Act of October 3, 1917.

XX.

"That neither said John P. Carter, nor said Rex B. Goodcell were at the commencement of this suit in the employ of the Federal Government in the capacity of Collector of Internal Revenue for the Sixth Collection District, said John P. Carter having resigned on the 5th day of March, 1922 and Rex B. Goodcell having resigned on the 5th day of April, 1926.

XXI.

"That no action upon the claims hereinbefore referred to, other than as herein set forth, has been taken before Congress or before any of the departments of the Government of the United States, or in any court other than by the amended petition filed herein; that plaintiffs are now the sole owners thereof.

XXII.

"That the correct tax liability of the Trumble Refining Company for the year 1917 is the sum of $3,389.19 and that the Trumble Refining Company overpaid its taxes for the year 1917 by the total sum of $16,341.68; that there is now due and owing to these plaintiffs for taxes thus overpaid for the year 1917 the total sum of $16,341.68, together with interest at the rate of 6% from the dates paid, $6,231.83 having been paid on May 22, 1923 and the balance thereof, to wit, $10,110.05 having been paid on June 14, 1918.

"CONCLUSIONS OF LAW

"The premises considered the Court concludes as a matter of law as follows:

I.

"That subsequent to the original rejection of said company's first claim for refund and first claim for abatement, that is to say, that subsequent to December 13, 1921 and prior to February, 1923, and likewise subsequent to February, 1923, the Commissioner reopened and kept reopened

and continued to give further consideration to said company's claims and contentions respecting taxes paid and also respecting additional taxes proposed to be assessed for the year 1917; that said company's claims and contentions respecting such taxes were still pending before and under consideration by the Commissioner on the date, to wit, April 25, 1929, when said company filed its revised claim for refund, and that said company's claims and contentions respecting such taxes were finally passed upon and determined by the Commissioner when he rejected said revised claim for refund.

II.

"That the Commissioner's letters of February 21, 1920 and February 5, 1923, advising the Trumble Refining Company that its taxes had been computed under Section 210 of the Revenue Act of 1917 were not regarded by the Commissioner as final determinations of its tax liability, the essential factor, to wit, the net income of the Trumble Refining Company not then having been finally determined, but on the contrary the Commissioner kept the case open and kept re-examining the situation; that the Commissioner's act on or about July 14, 1924 of determining that the Trumble Refining Company's patent license agreements had a March 1, 1913 value of $160,000.00, vacated and set aside whatever determination he had made that the Trumble Refining Company's tax liability should be determined under the provisions of Section 210 of the Revenue Act of October 3, 1917.

III.

"That the claim herein sued upon was filed within the time allowed by law.

IV.

"That this Court has jurisdiction to hear and determine this proceeding.

V.

"That the plaintiffs are entitled to have refunded to them and to recover from the defendant:

"(a) The sum of $10,110.05, together with interest thereon at the rate of six per cent (6%) per annum from June 14, 1918; and

"(b) The sum of $6,231.83, together with interest thereon at the rate of six per cent (6%) per annum from May 22, 1923.

"Let judgment be entered accordingly and let proper exceptions by the defendant to the aforesaid conclusions be noted.

"Dated this ..... day of June, 1937.

.....

Judge."

On the first day of July, 1937 the defendant prepared and presented to the Court Special Findings of Fact and Conclusions of Law together with a request for the adoption of the same in the words and figures as follows:

"(Title of Court and Cause)

"REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

"Comes now the defendant above named, and requests the Court that in rendering and making its Judgment in the above-entitled cause, it makes specific Findings of Fact and Conclusions of Law upon the issues included in said cause as set forth in proposed Findings of Fact and Conclusions of Law hereto attached.

.....

PEIRSON M. HALL,

United States Attorney

.....

E. H. MITCHELL,

Asst. U. S. Attorney

.....

EUGENE HARPOLE,

Special Attorney for the Treasury Department."

"(Title of Court and Cause)

"FINDINGS OF FACT AND CONCLUSIONS OF LAW

"The above-entitled action came on regularly for trial before the Court sitting without a jury, a jury having been waived in writing by the parties, on the 2nd day of February, 1937, A. Calder Mackay. Esq. appearing as attorney for the plaintiffs, Peirson M. Hall, United States Attorney for the Southern District of California, E. H. Mitchell, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney for the Treasury Department, appearing as attorneys for the defendant, and evidence both oral and documentary having been introduced by the respective parties, the cause submitted to the Court for decision, and the Court having fully considered the evidence, from said evidence makes the following:

"FINDINGS OF FACT

I.

"That the Trumble Refining Company was incorporated under the laws of the State of Arizona and existed as a corporation from July 13, 1910, until its dissolution on March 24, 1930. (Par. I, Stip.)

II.

"That the plaintiffs herein are the trustees in dissolution of said Trumble Refining Company. (Par. I, Stip.)

III.

"That the Trumble Refining Company filed its original Corporate Income and Excess Profits Tax Returns for the calendar year 1917 on March 29, 1918 and April 20, 1918, and thereafter and on June 14, 1918, paid income and excess profits taxes disclosed upon said returns in the sum of $11,870.88. (Par. III, Stip.)

IV.

"That on February 21, 1920, the Commissioner of Internal Revenue, by letter, notified the Trumble Refining Company that its income and excess profits taxes for the calendar year 1917 had been recomputed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917, and that an additional tax of $6,365.00 had been determined for said year and proposed for assessment. (Par. IV, Stip.)

V.

"That the additional income and excess profits tax of the Trumble Refining Company for the year 1917 in the sum of $6,365.00, as computed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917, were assessed by the Commissioner of Internal Revenue on May 17, 1920. (Par. V, Stip.)

VI.

"That on June 17, 1920, Trumble Refining Company filed a claim for abatement of the additional taxes, computed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917, and assessed by the Commissioner of Internal Revenue on May 17, 1920, in the sum of $6,365.00. (Par. V, Stip.)

VII.

"That on July 2, 1920 the Trumble Refining Company filed a claim for the refund of $9,749.80, income and excess profits taxes paid by it for the calendar year 1917, on June 14, 1918. (Par. VII, Stip.)

VIII.

"That on December 13, 1921, said claim for abatement and said claim for refund filed by the Trumble Refining Company relative to its 1917 income and excess profits taxes were rejected by the Commissioner of Internal Revenue. (Par. VIII, Stip.)

IX.

"That no suit for the recovery of any part of the tax paid by the Trumble Refining Company for the calendar year 1917 was commenced within two years after December 13, 1921. (Comp.)

X.

"That on January 21, 1922, the Trumble Refining Company filed a second claim for the abatement of the additional tax assessed against it for the calendar year 1917.

XI.

"That on February 5, 1923, the Commissioner of Internal Revenue advised the Trumble Refining Company in writing that its income and excess profits tax had been redetermined under the Special Assessment provisions of Section 210 of the Revenue Act of 1917, and that an overassessment of $151.17 resulted. Said overassessment was abated. (Pars. XII-XIII, Stip., Ex. K.)

XII.

"That on May 22, 1923, the Trumble Refining Company paid the additional tax in the sum of $6,213.83, determined to be due from it under the Special Assessment provisions of Section 210 of the Revenue Act of 1917. (Par. XVI, Stip.)

XIII.

"That no claim for the refund of any part of the additional tax for the year 1917 paid by the Trumble Refining Company on May 22. 1923, was filed within five years thereafter. (Comp. Par. XVIII, Stip.)

XIV.

"That on April 25, 1929, the Trumble Refining Company filed a claim for refund of the taxes paid by it for the calendar year 1917 on the 14th day of June, 1918, and the 22nd day of May, 1923. (Par. XVIII, Stip.)

XV.

"That on July 25, 1930, the Commissioner of Internal Revenue notified the Trumble Refining Company in writing that its claim for refund of 1917 taxes filed on April 25, 1929, had been rejected. (Par. XIX, Stip.)

XVI.

"That the Trumble Refining Company's income and excess profits tax for the year 1918 was computed under the Special Assessment provisions of Section 328 of the Revenue Act of 1918. (Plf. Ex. 6, Govt. Ex. C.)

"CONCLUSIONS OF LAW

"From the foregoing Findings of Fact the Court makes the following Conclusions of Law:

I.

"That no action for the recovery of any part of the sum of $11,870.88 paid by the Trumble Refining Company on June 14, 1918, as income and excess profits taxes for the calendar year 1917, was commenced within five years from the payments of said tax or any part thereof, nor within two years from December 13, 1921, the date upon which the Commissioner of Internal Revenue rejected the claim for refund filed by the taxpayer on July 2, 1920, and that the plaintiffs herein are barred by the provisions of Section 3226 of the Revised Statutes of the United States from recovering any part of the said tax paid on June 14, 1918.

II.

"That no claim for the refund of the sum of $6,213.83, paid by the Trumble Refining Company on May 22, 1923, as additional income and excess profits taxes for the calendar year 1917 was filed within five years from the payment of said tax or any part thereof, and that the plaintiffs herein are barred by the provisions of Section 284(b)(1)(2) of the Revenue Act of 1926 from a recovery in this action of any part of said tax paid on May 22, 1923.

III.

"That the tax involved in this action was determined and assessed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917, and that this Court has no jurisdiction to review the determination of said tax made by the Commissioner of Internal Revenue.

....

UNITED STATES DISTRICT JUDGE.

Presented, refused, and exception noted in favor of defendant this ..... day of ....., 1937."

Subsequently, and on the 2nd day of August, 1937, the Court entered the following Minute Order:

"(Date, Title of Court and Cause)

"This cause coming on for hearing on motion of defendant for arrest of Judgment and Dismissal of Action; A. Calder Mackay, Esq., appearing for the plaintiffs; Eugene Harpole, Esq., appearing for the defendant;

"Attorney Harpole argues in support of motion; attorney Mackay argues in opposition thereto; whereupon the Court orders that the said motion be submitted."

On the 6th day of December, 1937 the following Minute Order was entered by the Court:

"(Title of Court and Cause)

"MINUTE ORDER, JUDGE HOLLZER'S CALENDAR, December 6, 1937.

"Good cause appearing therefor, it is ordered that the submission of this cause be vacated and the same be placed on the calendar on December 13, 1937, at 10 A. M. for consideration of revised motions respecting findings of fact, conclusions of law and judgment."

On December 6, 1937 the following communication was directed to counsel for the parties from the chambers of the United States District Judge having the case under consideration:

"December 6, 1937

"To the attorneys in Gutzler vs Welch:

"A minute order has this day been entered vacating the submission of the above entitled matter and placing the cause on the calendar for next Monday at 10 AM. Judge Hollzer wishes to advise you that the purpose of this order is to enable the attorneys, in the interim, to prepare revised findings of fact and conclusions of law, combining all of such findings and conclusions heretofore proposed by either side respecting which there is no controversy, and adding thereto such additional findings and conclusions as the attorneys contend ought to be incorporated therein.

Yours very truly,

Bernice Morris,
Secretary to Judge Hollzer."

Thereafter, and on December 18, 1937, further proceedings were had as recorded in the following Minute Order entered by the Court:

"SATURDAY, DECEMBER 18, 1937
COURT CONVENES AT 10 O'CLOCK A. M.

PRESENT: THE HONORABLE HARRY A. HOLLZER, DISTRICT JUDGE

A. J. GUTZLER, et al, Plaintiffs,	)	
v.	)	No. 5767-H. Law
UNITED STATES OF AMERICA, Defendant.	)	

"A. Calder Mackay, Esq., appearing for the plaintiffs; Eugene Harpole, Special Assistant in the United States Treasury Department, appearing for the Government;

"Order is entered vacating hearing date of December 20, 1937, regarding consideration of Objections to Findings, etc., and proceedings are entered on hearing the said objections. Order is entered that plaintiffs' Findings IV, VI, VII, X and XV stand and exception noted to the de-

fendant, and order is entered stating that Findings III, VIII, XVIII and XXI stand as modified pursuant to stipulation, and exception is noted to the defendant. Exception is noted to the defendant on Findings XI, XII, XIII, XVI, XVII and XXII. Finding IX is corrected pursuant to stipulation and said Finding and the rest of the Findings accepted by the Defendant.

"It is further ordered that defendant's proposed Conclusions of Law I and II, be rejected and exception noted, and decision is reserved on Conclusion III. The Defendant is ordered to file a short memorandum as to how, in the face of the Findings in their final form, the Government applies the last decision of the Supreme Court. The Court orders the plaintiffs to revamp the Findings proposed by them, setting forth the Conclusions on a separate page, following the mechanics the Court suggested regarding the revamping of the Findings. The Court further orders the defendant's proposed Findings XIII and XIV rejected and exception noted to the defendant."

Subsequently and on or about the 18th day of January, 1938 the plaintiffs prepared, served and presented to the Court Special Findings of Fact and Conclusions of Law, together with a request for the adoption thereof in the words and figures as follows:

"(Title of Court and Cause)

"REQUEST BY PLAINTIFFS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

"Come now the plaintiffs above named and hereby request the Court, that in rendering and making its judgment in the above entitled cause, which has been submitted to the Court, said Court make specific Findings of Fact and Conclusions of Law upon the issue included in said cause, as set forth in the proposed Findings of Fact and Conclusions of Law hereto attached.

"Dated: January 12, 1938.

THOMAS R. DEMPSEY
Thomas R. Dempsey
A. CALDER MACKAY
A. Calder Mackay
Attorneys for Plaintiffs.

"Approved as to form as provided by Rule 44, except as to Finding #XXVIII:

BEN HARRISON – E. H.
United States Attorney
E. H. MITCHELL – E. H.
Assistant United States Attorney
EUGENE HARPOLE
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant.

"FINDINGS OF FACT

I.

"That the defendant, the United States of America, was, during all times material to this action, and still is, a sovereign body politic.

II.

"That the Trumble Refining Company was incorporated under the laws of the State of Arizona on or about July 13, 1910, and existed as a corporation until on or about March 24, 1930. That the said Trumble Refining Company was duly and regularly qualified to do business in the State of California and its principal place of business was located at Los Angeles, California. That on or about March 24, 1930 said Trumble Refining Company was duly and regularly dissolved and plaintiffs are now duly appointed, qualified and acting trustees in dissolution of said corporation and are empowered and entitled to institute and maintain causes of action for and on behalf of said Trumble Refining Company.

III.

"That the Trumble Refining Company within the time allowed by law and on March 29, 1918 and April 20, 1918, filed with the then Collector of Internal Revenue, John P. Carter, its original and amended income and excess profits tax returns, respectively, for the year 1917 wherein it disclosed a gross income of $97,503.11, deductions of $8,033.57 and a net taxable income of $89,469.54,

which resulted in a tax liability, computed under Section 209 of the Revenue Act of 1917, of $11,870.68, which on June 14, 1918 was paid to the said Collector of Internal Revenue.

IV.

"In determining its net taxable income as shown on said last mentioned return Trumble Refining Company inadvertently failed and neglected to take as a deduction from its gross income the exhaustion sustained upon its patent license agreements.

V.

"That the said Trumble Refining Company from the time of its inception to and including the year 1917 was the owner and in possession of certain patent license agreements which on March 1, 1913 had a fair market value of $850,000.00 and a remaining useful life from March 1, 1913 of eleven years, eight months and twenty days, and was therefore, entitled, in the determination of its net taxable income, to an annual deduction of $72,511.90, for the exhaustion of said patent license agreements. That the Trumble Refining Company's net taxable income for the year 1917 was the sum of $16,957.64.

VI.

"That the invested capital of the Trumble Refining Company for the year 1917, as computed under the provisions of Section 207 of the Revenue Act of 1917, is the sum of $67,760.17.

VII.

"That by letter dated February 21, 1920 the Commissioner of Internal Revenue proposed additional taxes against the Trumble Refining Company for the year 1917 in the sum of $6,365.00; in said letter of February 21, 1920 the Commissioner advised the Trumble Refining Company that in his opinion its business was of such a character as normally to require a substantial capital investment and the income was attributable to the employment of capital, and that therefore the tax liability of Trumble Refining Company could not properly be determined under the provisions of Section 209 of the Revenue Act of 1917; in said letter the Commissioner furthermore advised the Trumble Refining Company that in his opinion a large part of the Trumble Refining Company's invested capital could not be included under the statutory requirements for tax purposes and that therefore he had computed the tax under the provisions of Section 210 of the Revenue Act of 1917.

VIII.

"That the additional taxes of $6,365.00 so computed by the Commissioner were based upon a net income of $89,-469.54 – the net income reported by the Trumble Refining Company in its original return which was erroneously computed without allowance for the exhaustion of its patent rights.

IX.

"That the additional income and excess profits tax of the Trumble Refining Company for the year 1917 in the sum of $6,365.00, as computed under the Special Assessment

provisions of Section 210 of the Revenue Act of 1917 and proposed in said letter of February 21, 1920 were assessed by the Commissioner of Internal Revenue on May 17, 1920.

X.

"That thereafter and on or about June 17, 1920 the Trumble Refining Company filed an amended income tax return for the year 1917 wherein it claimed a deduction for the exhaustion of its patent license agreements or royalty contracts in the sum of $54,121.42 based upon a March 1, 1913 value of $811,821.36 and wherein it disclosed an income tax liability of only $2,120.88

XI.

"That as a part of said last mentioned amended return the Trumble Refining Company on June 17, 1920 filed a claim for abatement of the said assessment made on May 17, 1920 of additional taxes in the sum of $6,365.00 for the year 1917.

"That as a part of said last mentioned amended return and said claim for abatement the Trumble Refining Company on or about July 2, 1920 filed its claim for refund demanding the return to it on account of the overpayment of taxes by it for the year 1917 of the sum of $9,749.80.

XII.

"That during August, 1921, the Commissioner of Internal Revenue through his Internal Revenue Agent at Los Angeles caused an investigation to be made in the matter

of said amended return, said claim for refund and said claim for abatement, and as a result of such investigation additional income and excess profits taxes of $40,289.98 for the year 1917, and also large sums for the years 1918, 1919 and 1920 were proposed; that thereafter and under date of December 13, 1921 the Commissioner of Internal Revenue advised the Trumble Refining Company that its claim for refund filed on July 2, 1920, and its claim for the abatement of the taxes proposed by the Commissioner in his letter of February 21, 1920 were rejected.

XIII.

"That on or about January 13, 1922 a demand for the payment of said additional income and excess profits taxes of $6,365.00 covered by the aforementioned claim for abatement and the Commissioner's letter dated February 21, 1920, together with accrued interest of $1,082.05 aggregating $7,447.05, was made upon the Trumble Refining Company by the Collector of Internal Revenue for the Sixth Collection District of California. That on or about January 21, 1922 a second claim for abatement of said additional taxes for the year 1917 in the sum of $6,365.00 was filed with the Collector of Internal Revenue for the Sixth Collection District of the State of California.

XIV.

"That on or about February 1, 1922 the Trumble Refining Company filed with the Commissioner of Internal Revenue a comprehensive brief and formal protest against the additional income and excess profits taxes proposed

and set forth in the Revenue Agent's report, made by Revenue Agent Degele, dated August 17, 1921 for the years 1917 to 1920, inclusive, which brief and protest were prepared by said company's tax consultant, dealing with the subject matter of assessment of Federal taxes against it for the years 1917 to 1920, inclusive; that in and by said brief said company protested against the proposed additional taxes for each of the last mentioned years; that the principal contention discussed in said brief, and the one which said company asserted was applicable to, and affected alike each of the years 1917 to 1920, inclusive, was its contention that it was entitled to an annual deduction of $54,121.42 from income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements; that said brief contained, among other things, a computation of Federal income taxes for the year 1917, and also showed and claimed that the total tax due the United States Government from the Trumble Refining Company for the year 1917 amounted to the sum of $2,091.59 and that it had paid a Federal tax for that year amounting to $11,870.68, and that there was a refund due to said company for said year of $9,679.09.

XV.

"That on December 9, 1922 the Trumble Refining Company's income tax consultant, Mr. E. P. Adams, conferred with one of the officials of the Bureau of Internal Revenue, said official being then in charge of the Special Audit Section; that at said conference said company's tax consultant requested a hearing on the subject of said com-

pany's taxes for the years 1917 to 1920, inclusive; that said official responded that said Bureau of Internal Revenue was not yet ready to take up the matter of the company's taxes for all of those years but would hold in abeyance the consideration and final determination of the tax liability for 1917 until said company's taxes for the remaining years could also be reviewed and finally determined. That at the request of said official, confirmed in writing by the Commissioner of Internal Revenue in a letter dated January 19, 1923, the Trumble Refining Company on or about February 1, 1923 executed and filed with the Commissioner of Internal Revenue an income and excess profits tax waiver, being an unlimited waiver of the statute of limitations governing the time within which the Commissioner could make additional assessments of taxes against said company for the year 1917.

XVI.

"That on February 5, 1923 the Commissioner of Internal Revenue notified the Trumble Refining Company that its taxes for the year 1917 had been redetermined under the provisions of Section 210 of the Revenue Act of October 3, 1917 with the result that there appeared to be an overassessment of $151.17 which was abated; that said proposed overassessment was based upon a net income of $88,727.83, which was erroneously computed without allowance for the exhaustion sustained on patent rights; that thereafter and under date of February 23, 1923 and in response to said notice said Trumble Refining Company

wrote to the Commissioner of Internal Revenue calling attention to its said brief aforementioned and also calling attention to the aforementioned conference had by its tax consultant with an official of the Bureau on December 9, 1922, at which conference request had been made for a joint consideration of all the years involved at a hearing to be held in Washington, and in said response said company also requested that under these conditions further action be withheld in the matter of entering an overassessment for 1917 and also requested the privilege of filing additional data to prove Trumble Refining Company's right to a substantial deduction for the exhaustion of its patent rights.

XVII.

"That on or about May 15, 1923 the Trumble Refining Company telegraphed the Commissioner of Internal Revenue that in view of the understanding reached at said conference held December 9, 1922 and because the questions involved for the year 1917 affected all years, he should instruct the local Collector of Internal Revenue to withhold collection of additional taxes assessed for 1917 and that the Commissioner should fix a date for a conference at which all years might be considered; that thereafter and in response to said company's telegram, the Commissioner, on or about May 21, 1923, telegraphed said company that he had no authority to instruct the Collector to accept abatement claim to replace the claim rejected, but that a conference might be arranged on the 1917 case if a formal

protest were filed and that it was impracticable on later years until information submitted was considered and audit completed.

XVIII.

"That acting in conformity with the telegraphic instructions, the income tax consultant of Trumble Refining Company in the early part of May, 1924 held a conference with an official of the Commissioner of Internal Revenue's office and at said conference said company's representative delivered to said official a brief and protest containing additional data to support its right to an annual deduction from its gross income for the exhaustion of its patent license agreements based upon the March 1, 1913 value thereof.

XIX.

"That in said brief the Trumble Refining Company protested against the decisions of the Commissioner on which assessment of additional taxes had been made for the year 1917, and were proposed for 1918 and subsequent years; that in said brief additional arguments were presented in support of said company's contention that it was entitled to the previously claimed annual deduction from income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements; that at said last mentioned conference said company's representative discussed with said official said company's contentions respecting taxes as to all of said years and that during said con-

ference said official had before him a file containing documents pertaining to said company's taxes for all of said years; that among such documents then in the hands of said official were said income tax returns, claims for refund and briefs, which briefs were filed on behalf of said company in February, 1922 and May, 1924, respectively, and also the Revenue Agent's report upon which additional assessments had been proposed to be made against said company for the years 1917 to 1920, inclusive.

XX.

"That on May 22, 1923 the Trumble Refining Company paid under protest to the then Collector of Internal Revenue Rex B. Goodcell the sum of $7,860.19 covering said additional taxes for 1917 of $6,213.83 ($6,365.00 minus $151.17) and accrued interest thereon of $1,646.36.

XXI.

"That on July 14, 1924 the Committee on Appeals and Review of the Commissioner's office considered the subject matter of the assessment of additional taxes against said company and thereafter recommended to the Commissioner that the March 1, 1913 value of said patent license agreements of Trumble Refining Company be fixed at the sum of $160,000.00 and that amoritization be allowed to said Company on account of exhaustion of said patent license agreements on the basis of such valuation and that thereupon said recommendation was adopted by the Commissioner.

XXII.

"That the Committee on Appeals and Review also determined that the taxes of the Trumble Refining Company for the year 1918 should be computed under the provisions of Section 328 of the Revenue Act of 1918 and approved a rate of 41.37 per cent. That the actions of the Committee on Appeals and Review in this respect were approved by the Commissioner of Internal Revenue.

XXIII.

"That thereafter appeals were taken by the said Trumble Refining Company to the United States Board of Tax Appeals with respect to said company's taxes for the years 1918 and 1920 to 1923, inclusive, and thereafter and on or about November 19, 1928 the Board of Tax Appeals in the cases of Trumble Refining Company of Arizona, Docket No. 11763 involving the year 1918, Docket No. 17492 involving the years 1920 and 1921, Docket No. 26434 involving the year 1922 and Docket No. 32151 involving the year 1923, rendered its decision (reported in 14 B. T. A. page 348) holding that the Trumble Refining Company on March 1, 1913 was the owner and in possession of patent license agreements which on March 1, 1913 had a fair market value of $850,000.00 and a remaining useful life from March 1, 1913 of eleven years, eight months and twenty days, and was therefore entitled in the determination of its net taxable income to an annual deduction of $72,511.90 for the exhaustion and depreciation of the value of said patent license agreements; that on the 30th day of October, 1929, the United States Board of

Tax Appeals entered its final order determining that the Trumble Refining Company was entitled to an annual deduction in the sum of $72,511.90 for the exhaustion of its license agreements. That neither the Trumble Refining Company nor the plaintiffs took an appeal from the Board's decision and said decision became final.

XXIV.

"That on or about April 25, 1929 the Trumble Refining Company filed with the Commissioner of Internal Revenue its revised claim for refund in the sum of $17,764.08 on account of taxes, plus interest thereon, paid for the year 1917 as aforesaid, said claim being computed in conformity with the aforementioned decision of the Board of Tax Appeals. That the Commissioner of Internal Revenue in his letter dated May 22, 1930, sent to the Trumble Refining Company, referred to claims for refund of the Trumble Refining Company for the years 1913, 1914, 1915, 1916, 1917, 1919, 1920, 1922 and 1923. In said letter the Commissioner stated that all of the claims for said years were based upon the contention that the Trumble Refining Company was entitled to an annual deduction from income of $72,511.90 for depreciation of license agreements in view of the decision rendered by the United States Board of Tax Appeals for the years 1918, 1920, 1921, 1922 and 1923, Docket Numbers 11763, 17492, 26434 and 32151, wherein the Trumble Refining Company was allowed a March 1, 1913 value of $850,000.00 on certain license agreements for depreciation purposes resulting in an an-

nual deduction of $72,511.90 based upon an average life of eleven years, eight months and twenty days as at March 1, 1913. In said letter the Commissioner of Internal Revenue advised the Trumble Refining Company that its claims for refund for 1920, 1922 and 1923 had been allowed in accordance with the decision of the United States Board of Tax Appeals; also that said company's claims for refund for the years 1913, 1914, 1915, 1916 and 1919 were barred by the statute of limitations and that since no tax was paid for any of the last mentioned years within four years of the filing of the claim, the statute of limitations had run and no refund could be made. The letter also advised the taxpayer that since the Commissioner had not acquiesced in said decision of said Board of Tax Appeals with respect to the March 1, 1913 valuation of said license agreements for depreciation purposes, said company's contention could not be allowed for those years which were not pending before said Board, namely, 1913 to 1917, inclusive, and 1919. That the Commissioner's action in refusing to allow Trumble Refining Company a deduction of $72,511.90 from its gross income for 1917 in accordance with the decision of the Board of Tax Appeals and in refusing to allow the refund due as a result of such allowance was arbitrary.

XXV.

"That the Commissioner of Internal Revenue in his letter to the Trumble Refining Company under date of November 3, 1930 for the first time stated or took the

position in his negotiations with said Trumble Refining Company to the effect that a reopening of its claim for refund on account of 1917 taxes was prohibited and that the period for bringing suit thereon had expired, and at no time did the Commissioner advise the Trumble Refining Company that its refund for 1917 could not be allowed because its taxes were properly computed under the provisions of Section 210 of the Revenue Act of 1917.

XXVI.

"That on July 25, 1930 the Commissioner of Internal Revenue notified the Trumble Refining Company in writing that its revised claim for refund filed on April 25, 1929 for the refund of 1917 taxes had been rejected.

XXVII.

"That at all times from and after June 17, 1920 the Trumble Refining Company in its negotiations and dealings with the Commissioner took the position that it was entitled annually to a deduction from its gross income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements, such annual deduction being claimed to be in excess of the sum of $54,000.00; that the Commissioner's rejection on December 13, 1921 of said company's original claim for refund was vacated and set aside, and that said claim was reopened and reconsidered and was not rejected until July 25, 1930; that the Commissioner of Internal Revenue from the time the Trumble Refining Company filed its amended income

tax return in June, 1920, disclosing that it had overpaid its taxes and was entitled to a refund for the taxes so overpaid, up to and until the date of the rejection of its revised claim considered the data and arguments submitted by the Trumble Refining Company and held in abeyance a final determination of the net taxable income of the Trumble Refining Company for the year 1917.

XXVIII.

"That the Trumble Refining Company at no time requested or acquiesced in a determination of its excess profits taxes for the year 1917 in accordance with the provisions of Section 210 of the Revenue Act of October 3, 1917, and at all times material to this action protested the determination of its taxes under said section, and at all times protested the Commissioner's determination that its net taxable income was $89,469.54 or $88,727.83 or any sum in excess of $16,957.64; that the Commissioner was adequately apprised, prior to the making of his special assessment, of the various grounds upon which error was claimed in his computation of net income and tax; that the Commissioner never took the position that his special assessment made under the provisions of Section 210 of the Revenue Act of 1917 concluded the matter, but on the contrary kept the case open and kept on re-examining the factors essential to determine the net taxable income of Trumble Refining Company for the year 1917; that the Commissioner's determinations to assess Trumble Refining Company under the provisions of Section 210 of the Revenue Act of October 3, 1917 made by him in his letters of February 21, 1920 and February 5, 1923 were vacated and set aside and at no time has the Commissioner of Internal Revenue made a final determination that the Trumble Re-

fining Company's income tax liability should be computed under the provisions of Section 210 of the Revenue Act of October 3, 1917.

XXIX.

"That neither said John P. Carter, nor said Rex B. Goodcell were at the commencement of this suit in the employ of the Federal Government in the capacity of Collector of Internal Revenue for the Sixth Collection District, said John P. Carter having resigned on the 5th day of March, 1922 and Rex B. Goodcell having resigned on the 5th day of April, 1926.

XXX.

"That no action upon the claims hereinbefore referred to, other than as herein set forth, has been taken before Congress or before any of the departments of the Government of the United States, or in any court other than by the original and the amended petitions filed herein; that plaintiffs are now the sole owners thereof.

XXXI.

"That the correct tax liability of the Trumble Refining Company for the year 1917 is the sum of $3,389.19 and that the Trumble Refining Company overpaid its taxes for the year 1917 by the total sum of $16,341.68; that there is now due and owing to these plaintiffs for taxes thus overpaid for the year 1917 the total sum of $16,341.68, together with interest at the rate of 6% from the dates paid, $6,213.83 having been paid on May 22, 1923, together with interest of $1,646.36, or a total of $7,860.19, and the balance thereof, to wit, $8,481.49 having been paid on June 14, 1918.

"CONCLUSIONS OF LAW.

"The premises considered, the Court concludes as a matter of law as follows:

I.

"That subsequent to the original rejection of said company's first claim for refund and first claim for abatement, that is to say, that subsequent to December 13, 1921 and prior to February 1923, and likewise subsequent to February 1923, the Commissioner reopened and kept reopened and continued to give further consideration to said company's claims and contentions respecting taxes paid and also respecting additional taxes proposed to be assessed for the year 1917; that said company's claims and contentions respecting such taxes were still pending before and under consideration by the Commissioner on the date, to wit, April 25, 1929, when said company filed its revised claim for refund, and that said company's claims and contentions respecting such taxes were finally passed upon and determined by the Commissioner when he rejected said revised claim for refund.

II.

"That the Commissioner's letters of February 21, 1920 and February 5, 1923, advising the Trumble Refining Company that its taxes had been computed under Section 210 of the Revenue Act of 1917 were not regarded by the Commissioner as final determinations of its tax liability, the essential factor, to wit, the net income of the Trumble Refining Company not then having been finally determined, but on the contrary the Commissioner kept the case open and kept re-examining the situation; that the Commissioner's act on or about July 14, 1924 of determining that

the Trumble Refining Company's patent license agreements had a March 1, 1913 value of $160,000.00, vacated and set aside whatever determination he had made that the Trumble Refining Company's tax liability should be determined under the provisions of Section 210 of the Revenue Act of October 3, 1917.

III.

"That the claim herein sued upon was filed within the time allowed by law.

IV.

"That this Court has jurisdiction to hear and determine this proceeding.

V.

"That the plaintiffs are entitled to have refunded to them and to recover from the defendant:

"(a) The sum of $8,481.49, together with interest thereon at the rate of six per cent (6%) per annum from June 14, 1918; and

"(b) The sum of $7,860.19, together with interest thereon at the rate of six per cent (6%) per annum from May 22, 1923.

"Let judgment be entered accordingly and let proper exceptions by the defendant to the aforesaid findings and conclusions be noted.

"Dated this ..... day of ....., 1938.

.....

Judge."

Thereafter and on the 31st day of May, 1938 the Court accepted the proposed Findings of Fact and Conclusions of Law submitted by the plaintiffs and adopted, made and entered the same as its Findings of Fact and Conclusions of Law; denied the defendant's Motion for Arrest of Judgment and Dismissal of action and rejected the Special Findings of Fact and Conclusions of Law submitted by the defendant, and on May 31, 1938, the following Minute Order was duly made and entered:

"(Title of Court and Cause)

"MINUTE ORDER, JUDGE HOLLZER'S CALENDAR, MAY 31, 1938.

"It is ordered that the findings and judgment as proposed by defendant be rejected. An exception is allowed to defendant.

"(Copies to counsel)

"(Note to Counsel: Judge Hollzer has today signed the judgment as proposed by plaintiffs, and has inserted at Line 27, page one, 'ten thousand one hundred fifty-two and 7/100 ($10,152.70)'; at Line 30 of same page, 'seven thousand and eighty and 63/100 ($7,080.63)'; at Lines 1 and 2, page 2, 'thirty-three thousand, five hundred and seventy-five and 01/100 ($33,575.01)'.)"

The following Orders were made in the above entitled matter extending the time and the term within which to prepare, serve and file Bill of Exceptions:

That on the 7th day of June, 1938, an Order having been made in the above entitled matter which, omitting the title of Court and Cause was in the words and figures as follows, to-wit:

"(Title of Court and Cause)

"ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS.

"On Motion of Ben Harrison, United States Attorney for the Southern District of California, E. H. Mitchell, Assistant United States Attorney, and Armond Monroe Jewell, Assistant United States Attorney, for the Southern District of California, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and good cause appearing therefor,

"IT IS ORDERED that the time within which the defendant herein may serve and file its proposed bill of exceptions is hereby extended to and including the 31st day of August, 1938.

"Dated this 6th day of June, 1938.

H. A. HOLLZER
UNITED STATES DISTRICT JUDGE.

FILED
June 7, 1938
R. S. ZIMMERMAN, Clerk,
By R. B. Clifton, Deputy Clerk."

That on the 30th day of August, 1938, an Order having been made in the above entitled matter which, omitting the title of Court and Cause, was in the words and figures as follows, to-wit:

"(Title of Court and Cause)

"ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS

"On motion of Ben Harrison, United States Attorney for the Southern District of California, E. H. Mitchell, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and good cause appearing therefor,

"IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including the 31st day of October, 1938.

"Dated: August 30, 1938.

HARRY A. HOLLZER
UNITED STATES DISTRICT JUDGE"

That on the 30th day of August, 1938, an Order having been made in the above entitled matter which, omitting the title of Court and Cause, was in the words and figures as follows, to-wit:

"(Title of Court and Cause)

"ORDER EXTENDING TERM AND TIME

"Upon motion of the Defendant, and good cause appearing thereof,

"IT IS ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Time and the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including October 31, 1938, and the time therefor is extended accordingly.

"Dated: August 30, 1938.

HARRY A. HOLLZER
UNITED STATES DISTRICT JUDGE."

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for Trumble Refining Company, a dissolved corporation,	)	
Plaintiffs,	)	No. 5767-H
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

STIPULATION RE: APPROVAL OF BILL OF EXCEPTIONS

IT IS HEREBY STIPULATED AND AGREED by and between attorneys for plaintiffs and defendant that the foregoing Bill of Exceptions has been presented in time and that it may be approved, allowed and settled by the Judge in the above entitled Court as correct in all respects.

Dated: This 20th day of Oct., 1938.

Thomas R. Dempsey
Thomas R. Dempsey

A. Calder Mackay
A. Calder Mackay

Attorneys for Plaintiffs.

Ben Harrison – E. H.
Ben Harrison,

United States Attorney.

E. H. Mitchell – E. H.
E. H. Mitchell,

Asst. U. S. Attorney

Eugene Harpole
Eugene Harpole,

Special Attorney for the
Treasury Department.

Attorneys for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for Trumble Refining Company, a dissolved corporation,	)	
Plaintiffs,	)	No. 5767-H
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions duly proposed and agreed upon by counsel for the respective parties is correct in all respects, has been presented in time and is hereby approved, allowed and settled and made a part of the record herein and said Bill of Exceptions may be used by the parties, plaintiffs and defendant, upon any appeal taken by either parties, plaintiffs or defendant.

Dated: This 22 day of October, 1938.

H. A. Hollzer
UNITED STATES DISTRICT JUDGE.

[Endorsed]: Filed Oct. 24, 1938. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for TRUMBLE REFINING COMPANY, a dissolved corporation, Plaintiffs,	)	No. 5767-H
v.	)	PETITION FOR APPEAL FROM JUDGMENT ENTERED MAY 31, 1938
UNITED STATES OF AMERICA, Defendant.	)	

TO THE ABOVE ENTITLED COURT AND TO HONORABLE HARRY HOLLZER, JUDGE THEREOF:

Your petitioner, the defendant in the above entitled case, feeling aggrieved by the Judgment as entered herein in behalf of said plaintiffs on May 31, 1938, prays that this Appeal be allowed and that Citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly

authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the Rules of such Court in such cases made and provided and in connection with this petition, petitioner hereby presents Assignment of Errors dated August 29, 1938.

Dated: August 29, 1938.

Ben Harrison – EH
BEN HARRISON,
United States Attorney

E. H. Mitchell – EH
E. H. MITCHELL,
Asst. U. S. Attorney

Eugene Harpole
EUGENE HARPOLE,
Special Attorney for the
Treasury Department.

Attorneys for Defendant.

[Endorsed]: Filed Aug. 30, 1938. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The Defendant and Appellant above named makes and files the following Assignment of Errors upon which it will rely in the prosecution of its appeal from the Judgment of this Court entered herein on the 31st day of May, 1938:

I.

The Court erred in rendering judgment against the defendant and in favor of the plaintiffs in the amount $33,575.01, together with interest, for the reason that the Court had no jurisdiction of the subject matter of this action, the tax sought to be recovered having been assessed under the special assessment provisions of Section 210 of the Revenue Act of 1917.

II.

The Court erred in over-ruling and denying the defendant's motion for judgment for the reason that there was no substantial or sufficient evidence before the Court upon which to predicate a judgment for the plaintiffs and from said evidence the Court should have concluded, held and found as follows:

1. That no action for the recovery of any part of the sum of $11,870.88 paid by the Trumble Refining Company on June 14, 1918, as income and excess profits taxes for the calendar year 1917, was commenced within five years from the payments of said tax or any part thereof,

nor within two years from December 13, 1921, the date upon which the Commissioner of Internal Revenue rejected the claim for refund filed by the taxpayer on July 2, 1920, and that the plaintiffs herein are barred by the provisions of Section 3226 of the Revised Statutes of the United States from recovering any part of the said tax paid on June 14, 1918;

2. That no claim for the refund of the sum of $6,213.83, paid by the Trumble Refining Company on May 22, 1923, as additional income and excess profits taxes for the calendar year 1917 was filed within five years from the payment of said tax or any part thereof, and that the plaintiffs herein are barred by the provisions of Section 284(b)(1)(2) of the Revenue Act of 1926 from a recovery in this action of any part of said tax paid on May 22, 1923;

3. That the tax involved in this action was determined and assessed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917, and that this Court has no jurisdiction to review the determination of said tax made by the Commissioner of Internal Revenue;

4. That the defendant in this action is entitled to judgment against the plaintiffs for its costs.

III.

The Court erred in denying the defendant's motion for Arrest of Judgment and Dismissal of the action, for the reason that the Court had no jurisdiction on the subject matter of this action, the tax sought to be recovered hav-

ing been assessed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917.

IV.

The Court erred in adopting its Conclusion of Law numbered I, for the reason that said Conclusion of Law is not supported by the facts found by the Court in that said Findings of Fact numbered XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XXI, XXII and XXIII disclose that the claim for refund of 1917 taxes filed by the Trumble Refining Company on July 2, 1920, was rejected by the Commissioner of Internal Revenue on December 13, 1921, and that there was thereafter no reconsideration of said claim for refund by any officer of the Bureau of Internal Revenue possessed with the authority to reopen or reconsider refund claims, although there was thereafter elaborate consideration given to a proposal to assess additional taxes for the year 1918 and the Commissioner had the consideration of a claim for abatement of additional taxes assessed for the year 1917, which claim was filed on January 21, 1922, under advisement until February 5, 1923, when $151.17 of the additional tax was abated. The Trumble Refining Company paid the balance of said additional tax assessed for the year 1917 on May 22, 1923 and filed no claim for the refund thereof within five years thereafter.

V.

The Court erred in adopting its Conclusion of Law numbered II, for the reason that said Conclusion of Law is not supported by the facts found by the Court in that

said Findings of Fact numbered XXI, XXII and XXIII failed to disclose that the Committee on Appeals and Review ever considered the tax liability of Trumble Refining Company for the year 1917, but on the contrary it is disclosed that only additional tax liability for the year 1918 was under consideration by the Commissioner of Internal Revenue on June 14, 1924, or at any other time subsequent to February 5, 1923.

VI.

The Court erred in adopting its Conclusion of Law numbered III, for the reason that said Conclusion of Law is not supported by facts found by the Court or evidence before the Court in that it appears from the Findings of Fact that none of the Trumble Refining Company's income tax for the year 1917 was paid subsequent to May 22, 1923 and the claim for refund sued upon was not filed until April 25, 1929 and after the time allowed by law for the filing of a claim for refund had expired.

VII.

The Court erred in adopting its Conclusion of Law numbered IV, for the reason that it appears from the evidence and the facts found by the Court that the tax involved was computed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917 and that the Court is without jurisdiction to review the Commissioner's determination of said tax.

VIII.

The Court erred in adopting its Conclusion of Law numbered V, in that said Conclusion of Law is not supported by the facts found by the Court in the following respects:

(a) It has been found by the Court that the tax reported by the Trumble Refining Company on its 1917 corporate income tax return was paid on June 14, 1918, (Findings III); that a claim for the refund of this tax was filed July 2, 1920, (Findings XI), and it appears in the pleadings herein no suit was brought upon said claim within the statutory period of two years after its rejection;

(b) It has been found by the Court that the additional tax determined and assessed against the Trumble Refining Company for the taxable year 1917 was paid on May 22, 1923 (Findings XX) and that no claim for the refund thereof was filed until April 25, 1919, (Findings XXIV), or more than five years after said payment and subsequent to the time allowed by law for the filing of a claim for the refund of said tax paid on May 22, 1923.

IX

The Court erred in making its Findings of Fact numbered IV, V, VIII, XIV, XV, XVIII, XIX, XXI, XXII, XXIII, XXVII, XXVIII and XXXI, in that said Findings are not supported by the evidence before the Court and that the facts therein found relate to a proposed additional tax for the calendar year 1918 and not to any taxes paid for the year 1917.

X

The Court erred in adopting its Findings of Fact numbered XXIV, in that the evidence before the Court discloses that the claim for refund in the sum of $17,764.08 filed on April 25, 1929 was an original claim for refund filed more than five years after the taxes involved had been paid and was not an amendment or revision of any claim for refund previously filed for taxes paid for the calendar year 1917.

XI

The Court erred in refusing to adopt the Findings of Fact and Conclusions of Law requested by the defendant, in that the same were in accordance with and required by the evidence before the Court.

DATED: August 29, 1938.

Ben Harrison – EH
BEN HARRISON,
United States Attorney

E. H. Mitchell – EH
E. H. MITCHELL,
Asst. U. S. Attorney

Eugene Harpole
EUGENE HARPOLE,
Special Attorney for the
Treasury Department.

Attorneys for Defendant.

[Endorsed]: Filed Aug. 30, 1938. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

In the above entitled action, the defendant having filed its Petition for an Order allowing it to appeal from the Judgment entered in the above entitled action on May 31, 1938;

IT IS ORDERED that said appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby allowed to the defendant and that a certified transcript of the record, bill of exceptions, stipulations and pleadings and all proceedings herein be transmitted to said United States Circuit Court of Appeals.

DATED: August 30, 1938.

H. A. Hollzer
UNITED STATES DISTRICT JUDGE

[Endorsed]: Filed Aug. 30, 1938. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of District Court and Cause.]

PRAECIPE

TO: R. S. ZIMMERMAN, Clerk of the United States District Court, Southern District of California:

You are hereby requested to make a Transcript of Record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above-entitled cause, and to include in said Transcript of Record, the following papers:

1. Citation on Appeal;
2. First Amended Petition;
3. Copy of Minute Order of February 7, 1936;
4. Copy of Amendment to Amended Petition filed February 7, 1936;
5. Copy of Minute Order of February 11, 1936;
6. Answer to Amended Petition;
7. Court's Findings of Fact and Conclusions of Law;
8. Judgment;
9. Petition for Appeal;
10. Assignment of Errors on Appeal;
11. Order Allowing Appeal;
12. Bill of Exceptions;

13. This Praecipe;

14. Clerk's Certificate.

Dated: This 14th day of September, 1938.

Thomas R. Dempsey
Thomas R. Dempsey

A. Calder Mackay
A. Calder Mackay

Attorneys for Plaintiffs.

Ben Harrison – EH
BEN HARRISON,

United States Attorney

E. H. Mitchell – EH
E. H. MITCHELL,

Asst. U. S. Attorney

Eugene Harpole
EUGENE HARPOLE,

Special Attorney for the
Treasury Department.

Attorneys for Defendant.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the Appellant and Appellee that the foregoing Praecipe may be filed and shall be used for the purpose of the preparation of the record upon Appeal in the above-entitled action; that in preparing the record herein the Clerk of the United States District Court may omit all endorsements except the endorsements of the filing date, from the papers requested in the foregoing Praecipe.

Thomas R. Dempsey
Thomas R. Dempsey

A. Calder Mackay
A. Calder Mackay

Attorneys for Plaintiffs.

Ben Harrison – EH
BEN HARRISON,
United States Attorney

E. H. Mitchell
E. H. MITCHELL,
Asst. U. S. Attorney

Eugene Harpole
EUGENE HARPOLE,
Special Attorney for the Bureau of Internal Revenue

Attorneys for Defendant.

[Endorsed]: Filed Nov. 1, 1938. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy. Clerk.

[Title of District Court and Cause.]

PRAECIPE

TO THE CLERK OF SAID COURT:

Sir:

Please print sixty copies of the Transcript of Record on appeal in above entitled matter.

E. H. Mitchell A. R.
Assistant United States Attorney

[Endorsed]: Filed Nov 18 1938

[TITLE OF DISTRICT COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 408 pages, numbered from 1 to 408 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; first amended petition for recovery of income taxes; order of February 7, 1936, amendment to first amended petition; order of February 11, 1936; answer; request by plaintiffs for findings of fact and conclusions of law, and findings of fact; judgment; bill of exceptions; petition for appeal; assignment of errors; order allowing appeal, and praecipe.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of November, in the year of Our Lord One Thousand Nine Hundred and Thirty-eight and of our Independence the One Hundred and Sixty-third.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 9038.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for Trumble Refining Company, a dissolved corporation,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR THE UNITED STATES.

JAMES W. MORRIS,
Assistant Attorney General;

SEWALL KEY,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

BEN HARRISON,
Pacific Electric Bldg., Los Angeles, Calif.,
United States Attorney;

E. H. MITCHELL,
Asst. U. S. Attorney;

EUGENE HARPOLE,
Spec. Atty., Bureau of Internal Revenue.

FILED
JAN 3 - 1933
PAUL P. O'BRIEN,
CLERK

Parker & Baird Company, Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

No. 9038.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for Trumble Refining Company, a dissolved corporation,

Appellees.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The memorandum opinion of the District Court, which was filed March 1, 1937 [R. 331-339], is not reported. The District Court subsequently made findings of fact and conclusions of law [R. 43-58].

Jurisdiction.

This case involves income and excess profits taxes for the calendar year 1917. On May 31, 1938, the District Court entered judgment in favor of the taxpayer for the full amount claimed, $33,575.01 (including interest) [R. 59-60]. The petition for appeal and assignment of errors

[R. 396-403] were filed on August 30, 1938, and an order allowing the appeal was filed on August 30, 1938 [R. 404]. The jurisdiction of this Court is invoked by virtue of the provisions of Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether a timely suit was entered after the rejection of a timely claim for refund?

2. After the Commissioner of Internal Revenue has made a special assessment of profits taxes, pursuant to Section 210 of the Revenue Act of 1917, may a court, in an action for refund of such taxes, revise the Commissioner's determination of the taxpayer's net income?

Statutes and Regulations Involved.

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pages 41 to 49.

Statement.

The facts set forth below are taken from the findings of fact of the District Court. [R. 43-57.]

The Trumble Refining Company within the time allowed by law and on March 29, 1918, and April 20, 1918, filed with the then Collector of Internal Revenue, John P. Carter, its original and amended income and excess profits tax returns, respectively, for the year 1917, wherein it disclosed a gross income of $97,503.11, deductions of $8,033.57, and a net taxable income of $89,469.54, which resulted in a tax liability, computed under Section 209 of the Revenue Act of 1917, of $11,870.68, which on June 14, 1918, was paid to the said Collector of Internal Revenue.

By letter dated February 21, 1920, the Commissioner of Internal Revenue proposed additional taxes against the Trumble Refining Company for the year 1917 in the sum of $6,365; in said letter of February 21, 1920, the Commissioner advised the Trumble Refining Company that in his opinion its business was of such a character as normally to require a substantial capital investment and the income was attributable to the employment of capital, and that therefore the tax liability of Trumble Refining Company could not properly be determined under the provisions of Section 209 of the Revenue Act of 1917; in said letter the Commissioner furthermore advised the Trumble Refining Company that in his opinion a large part of the Trumble Refining Company's invested capital could not be included under the statutory requirements for tax purposes and that therefore he had computed the tax under the provisions of Section 210 of the Revenue Act of 1917. [R. 45.]

The additional income and excess profits tax of Trumble Refining Company for the year 1917 in the sum of $6,365, as computed under the special assessment provisions of Section 210 of the Revenue Act of 1917 and proposed in said letter of February 21, 1920, were assessed by the Commissioner of Internal Revenue on May 17, 1920. [R. 45.]

Thereafter and on or about June 17, 1920, the Trumble Refining Company filed an amended income tax return for the year 1917, wherein it claimed a deduction for the exhaustion of its patent license agreements or royalty contracts in the sum of $54,121.42, based upon a March 1, 1913, value of $811,821.36, and wherein it disclosed an income tax liability of only $2,120.88. [R. 45.]

As a part of said last-mentioned amended return the Trumble Refining Company, on June 17, 1920, filed a claim for abatement of the said assessment made on May 17, 1920, of additional taxes in the sum of $6,365 for the year 1917, and also filed its claim for refund, demanding the return to it on account of the overpayment of taxes by it for the year 1917 of the sum of $9,749.80.

During August, 1921, the Commissioner of Internal Revenue, through his Internal Revenue Agent at Los Angeles, caused an investigation to be made in the matter of said amended return, said claim for refund and claim for abatement and, as a result of such investigation, additional income and excess profits taxes of $40,289.98 for the year 1917, and also large sums for the years 1918, 1919 and 1920 were proposed. Thereafter and under date of December 13, 1921, the Commissioner of Internal Revenue advised the Trumble Refining Company that its claim for refund filed on July 2, 1920, and its claim for the abatement of the taxes proposed by the Commissioner in his letter of February 21, 1920, were rejected.

On or about January 13, 1922, a demand for the payment of said additional income and excess profits taxes of $6,365 covered by the aforementioned claim for abatement and the Commissioner's letter dated February 21, 1920, together with accrued interest of $1,082.05, aggregating $7,447.05, was made upon the Trumble Refining Company by the Collector of Internal Revenue for the Sixth Collection District of California. On or about January 21, 1922, a second claim for abatement of said additional taxes for the year 1917 in the sum of $6,365 was filed with the Collector of Internal Revenue for the Sixth Collection District of the State of California.

On or about February 1, 1922, the Trumble Refining Company filed with the Commissioner of Internal Revenue a comprehensive brief and formal protest against the additional income and excess profits taxes proposed and set forth in the Revenue Agent's report, made by Revenue Agent Degele, dated August 17, 1921, for the years 1917 to 1920, inclusive, which brief and protest were prepared by such company's tax consultant, dealing with the subject-matter of assessment of Federal taxes against it for the years 1917 to 1920, inclusive; that in and by that brief the company protested against the proposed additional taxes for each of the last-mentioned years; that the principal contention discussed in the brief, and the one which the company asserted was applicable to and affected alike each of the years 1917 to 1920, inclusive, was its contention that it was entitled to an annual deduction of $54,-121.42 from income by reason of the annual exhaustion of the March 1, 1913, value of its patent license agreements; that said brief contained, among other things, a computation of Federal income taxes for the year 1917, and also showed and claimed that the total tax due the United States Government from the Trumble Refining Company for the year 1917 amounted to the sum of $2,091.59, and that it had paid a Federal tax for that year amounting to $11,870.68, and that there was a refund due to said company for said year of $9,679.09. [R. 47.]

On December 9, 1922, the Trumble Refining Company's income tax consultant, Mr. E. P. Adams, conferred with one of the officials of the Bureau of Internal Revenue, that official being then in charge of the Special Audit Section; and at such conference the company's tax consultant requested a hearing on the subject of the company's

taxes for the years 1917 to 1920, inclusive; that such official responded that the Bureau of Internal Revenue was not yet ready to take up the matter of the company's taxes for all of those years, but would hold in abeyance the consideration and final determination of the tax liability for 1917 until the company's taxes for the remaining years could also be reviewed and finally determined. At the request of such official, confirmed in writing by the Commissioner of Internal Revenue in a letter dated January 19, 1923, the Trumble Refining Company, on or about February 1, 1923, executed and filed with the Commissioner of Internal Revenue an income and excess profits tax waiver, being an unlimited waiver of the statute of limitations governing the time within which the Commissioner could make additional assessments of taxes against such company for the year 1917. [R. 48.]

On February 5, 1923, the Commissioner of Internal Revenue notified the Trumble Refining Company that its taxes for the year 1917 had been redetermined under the provisions of Section 210 of the Revenue Act of October 3, 1917, with the result that there appeared to be an overassessment of $151.17, which was abated. [R. 48.]

Under date of February 23, 1923, and in response to said notice, the Trumble Refining Company wrote to the Commissioner of Internal Revenue, calling attention to its said brief aforementioned, and also calling attention to the aforementioned conference had by its tax consultant with an official of the Bureau on December 9, 1922, at which conference request had been made for a joint consideration of all the years involved at a hearing to be held in Washington and, in such response, the company also requested that, under these conditions, further action be withheld in the matter of entering an overassessment

for 1917 and also requested the privilege of filing additional data to prove Trumble Refining Company's right to a substantial deduction for the exhaustion of its patent rights. [R. 49.]

On or about May 15, 1923, the Trumble Refining Company telegraphed the Commissioner of Internal Revenue that, in view of the understanding reached at the conference held December 9, 1922, and because the questions involved for the year 1917 affected all years, he should instruct the local Collector of Internal Revenue to withhold collection of additional taxes assessed for 1917, and that the Commissioner should fix a date for a conference, at which all years might be considered; that thereafter, and in response to the company's telegram, the Commissioner, on or about May 21, 1923, telegraphed the company that he had no authority to instruct the Collector to accept abatement claim to replace the claim rejected, but that a conference might be arranged on the 1917 case if a formal protest were filed and that it was impracticable on later years until information submitted was considered and audit completed. [R. 49-50.]

The income tax consultant of Trumble Refining Company in the early part of May, 1924, held a conference with an official of the Commissioner of Internal Revenue's office, and at that conference the company's representative delivered to the official a brief and protest containing additional data to support its right to an annual deduction from its gross income for the exhaustion of its patent license agreements based upon the March 1, 1913, value thereof. (It is the Government's contention that this protest and conference dealt solely with the 1918 tax year.) [R. 50.]

In that brief additional arguments were presented in support of the company's contention that it was entitled to the previously-claimed annual deduction from income by reason of the annual exhaustion of the March 1, 1913, value of its patent license agreements; that at the last-mentioned conference the company's representative discussed with the official the company's contentions respecting taxes as to all of such years and that, during such conference, the official had before him a file containing documents pertaining to the company's taxes for all of those years; that among such documents then in the hands of such official were the income tax returns, claims for refund and briefs, which briefs were filed on behalf of the company in February, 1922, and May, 1924, respectively, and also the Revenue Agent's report, upon which additional assessments had been proposed to be made against said company for the years 1917 to 1920, inclusive. [R. 50-51.]

On May 22, 1923, the Trumble Refining Company paid, under protest, to the then Collector of Internal Revenue Rex B. Goodcell the sum of $7,860.19, covering the additional taxes for 1917 of $6,213.83 ($6,365 minus $151.17), and accrued interest thereon of $1,646.36. [R. 51.]

On July 14, 1924, the Committee on Appeals and Review of the Commissioner's office considered the subject-matter of the assessment of additional taxes against said company and thereafter recommended (as to 1918, we submit) to the Commissioner that the March 1, 1913, value of said patent license agreements of Trumble Refining Company be fixed at the sum of $160,000 and that amortization be allowed to the company on account of exhaustion of the patent license agreements on the

basis of such valuation and that thereupon the recommendation was adopted by the Commissioner. [R. 51.]

The Committee on Appeals and Review also determined that the taxes of the Trumble Refining Company for the year 1918 should be computed under the provisions of Section 328 of the Revenue Act of 1918 and approved a rate of 41.37 per cent. The actions of the Committee on Appeals and Review in this respect were approved by the Commissioner of Internal Revenue. [R. 51.]

Thereafter appeals were taken by the Trumble Refining Company to the United States Board of Tax Appeals with respect to the company's taxes for the years 1918 and 1920 to 1923, inclusive, and thereafter and on or about November 19, 1928, the Board of Tax Appeals in the cases of Trumble Refining Company of Arizona, Docket No. 11763, involving the year 1918; Docket No. 17492, involving the years 1920 and 1921; Docket No. 26434, involving the year 1922, and Docket No. 32151, involving the year 1923, rendered its decision (reported in 14 B. T. A. 348), holding that the Trumble Refining Company on March 1, 1913, was the owner and in possession of patent license agreements which on March 1, 1913, had a fair market value of $850,000, and a remaining useful life from March 1, 1913, of eleven years eight months and twenty days, and was therefore entitled in the determination of its net taxable income to an annual deduction of $72,511.90 for the exhaustion and depreciation of the value of the patent license agreements; that on the 30th day of October, 1929, the United States Board of Tax Appeals entered its final order determining that the Trumble Refining Company was entitled to an annual deduction in the sum of $72,511.90 for the exhaustion of its license agreements. That neither the

Trumble Refining Company nor the plaintiffs took an appeal from the Board's decision and the decision became final. [R. 52.]

On or about April 25, 1929, the Trumble Refining Company filed with the Commissioner of Internal Revenue its "revised" claim for refund in the sum of $17,764.08 on account of taxes, plus interest thereon, paid for the year 1917 as aforesaid, such claim being computed in conformity with the aforementioned decision of the Board of Tax Appeals. The Commissioner of Internal Revenue, in his letter dated May 22, 1930, sent to the Trumble Refining Company, referred to claims for refund of the Trumble Refining Company for the years 1913, 1914, 1915, 1916, 1917, 1919, 1920, 1922 and 1923. The letter advised the taxpayer that since the Commissioner had not acquiesced in the decision of the Board of Tax Appeals with respect to the March 1, 1913, valuation of the license agreements for depreciation purposes, the company's contention could not be allowed for those years which were not pending before the Board, namely, 1913 to 1917, inclusive, and 1919. [R. 53-54.]

On July 25, 1930, the Commissioner of Internal Revenue notified the Trumble Refining Company in writing that its revised claim for refund filed on April 25, 1929, for the refund of 1917 taxes had been rejected. [R. 54.]

The Trumble Refining Company at no time requested or acquiesced in a determination of its excess profits taxes for the year 1917 in accordance with the provisions of Section 210 of the Revenue Act of October 3, 1917. [R. 55.]

The Court concluded as follows [R. 57-58]:

That subsequent to the original rejection of the company's first claim for refund and first claim for abatement, that is to say, that subsequent to December 13, 1921, and prior to February, 1923, and likewise subsequent to February, 1923, the Commissioner reopened and kept reopened and continued to give further consideration to the company's claims and contentions respecting taxes paid and also respecting additional taxes proposed to be assessed for the year 1917, that the company's claims and contentions respecting such taxes were still pending before and under consideration by the Commissioner on the date, to-wit, April 25, 1929, when said company filed its revised claim for refund, and that the company's claims and contentions respecting such taxes were finally passed upon and determined by the Commissioner when he rejected the revised claim for refund.

That the Commissioner's letters of February 21, 1920, and February 5, 1923, advising the Trumble Refining Company that its taxes had been computed under Section 210 of the Revenue Act of 1917 were not regarded by the Commissioner as final determinations of its tax liability, the essential factor, to-wit, the net income of the Trumble Refining Company not then having been finally determined, but, on the contrary, the Commissioner kept the case open and kept reexamining the situation; that the Commissioner's act on or about July 14, 1924 (which, we submit, dealt only with 1918), of determining that the Trumble Refining Company's patent license agreements had a March 1, 1913, value of $160,000, vacated and set aside whatever determination he had made that the Trumble Refining Company's tax liability should be determined under the provisions of Section 210 of the Revenue Act of October 3, 1917.

Specification of Errors To Be Urged.

I.

The Court erred in rendering judgment against the defendant and in favor of the plaintiffs in the amount of $33,575.01, together with interest, for the reason that the Court had no jurisdiction of the subject-matter of this action, the tax sought to be recovered having been assessed under the special assessment provisions of Section 210 of the Revenue Act of 1917.

II.

The Court erred in overruling and denying the defendant's motion for judgment for the reason that there was no substantial or sufficient evidence before the Court upon which to predicate a judgment for the plaintiffs and from said evidence the Court should have concluded, held and found as follows:

1. That no action for the recovery of any part of the sum of $11,870.88 paid by the Trumble Refining Company on June 14, 1918, as income and excess profits taxes for the calendar year 1917 was commenced within five years from the payments of said tax or any part thereof, nor within two years from December 13, 1921, the date upon which the Commissioner of Internal Revenue rejected the claim for refund filed by the taxpayer on July 2, 1920, and that the plaintiffs herein are barred by the provisions of Section 3226 of the Revised Statutes of the United States from recovering any part of the said tax paid on June 14, 1918;

2. That no claim for the refund of the sum of $6,213.83, paid by the Trumble Refining Company on May 22, 1923, as additional income and excess profits taxes for the calendar year 1917 was filed

within five years from the payment of said tax or any part thereof, and that the plaintiffs herein are barred by the provisions of Section 284(b)(1)(2) of the Revenue Act of 1926 from a recovery in this action of any part of said tax paid on May 22, 1923;

3. That the tax involved in this action was determined and assessed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917, and that this Court has no jurisdiction to review the determination of said tax made by the Commissioner of Internal Revenue;

4. That the defendant in this action is entitled to judgment against the plaintiffs for its costs.

III.

The Court erred in denying the defendant's motion for arrest of judgment and dismissal of the action, for the reason that the Court had no jurisdiction on the subject-matter of this action, the tax sought to be recovered having been assessed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917.

IV.

The Court erred in adopting its conclusion of law numbered I, for the reason that said conclusion of law is not supported by the facts found by the Court in that said findings of fact numbered XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XXI, XXII and XXIII disclose that the claim for refund of 1917 taxes filed by the Trumble Refining Company on July 2, 1920, was rejected by the Commissioner of Internal Revenue on December 13, 1921, and that there was thereafter no reconsideration of said claim for refund by any officer of the Bureau of Internal Revenue possessed with the authority to reopen or

reconsider refund claims, although there was thereafter elaborate consideration given to a proposal to assess additional taxes for the year 1918 and the Commissioner had the consideration of a claim for abatement of additional taxes assessed for the year 1917, which claim was filed on January 21, 1922, under advisement until February 5, 1923, when $151.17 of the additional tax was abated. The Trumble Refining Company paid the balance of said additional tax assessed for the year 1917 on May 22, 1923, and filed no claim for the refund thereof within five years thereafter.

V.

The Court erred in adopting its conclusion of law numbered II, for the reason that said conclusion of law is not supported by the facts found by the Court in that said findings of fact numbered XXI, XXII and XXIII failed to disclose that the Committee on Appeals and Review ever considered the tax liability of Trumble Refining Company for the year 1917, but on the contrary it is disclosed that only additional tax liability for the year 1918 was under consideration by the Commissioner of Internal Revenue on June 14, 1924, or at any other time subsequent to February 5, 1923.

VI.

The Court erred in adopting its conclusion of law numbered III, for the reason that said conclusion of law is not supported by facts found by the Court or evidence before the Court in that it appears from the

findings of fact that none of the Trumble Refining Company's income tax for the year 1917 was paid subsequent to May 22, 1923, and the claim for refund sued upon was not filed until April 25, 1929, and after the time allowed by law for the filing of a claim for refund had expired.

VII.

The Court erred in adopting its conclusion of law numbered IV, for the reason that it appears from the evidence and the facts found by the Court that the tax involved was computed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917 and that the Court is without jurisdiction to review the Commissioner's determination of said tax.

VIII.

The Court erred in adopting its conclusion of law numbered V, in that said conclusion of law is not supported by the facts found by the Court in the following respects:

(a) It has been found by the Court that the tax reported by the Trumble Refining Company on its 1917 corporate income tax return was paid on June 14, 1918 (Findings III); that a claim for the refund of this tax was filed July 2, 1920 (Findings XI), and it appears in the pleadings herein no suit was brought upon said claim within the statutory period of two years after its rejection;

(b) It has been found by the Court that the additional tax determined and assessed against the Trumble Refining Company for the taxable year 1917

was paid on May 22, 1923 (Findings XX) and that no claim for the refund thereof was filed until April 25, 1929 (Findings XXIV), or more than five years after said payment and subsequent to the time allowed by law for the filing of a claim for the refund of said tax paid on May 22, 1923.

IX.

The Court erred in making its findings of fact numbered IV, V, VIII, XIV, XV, XVIII, XIX, XXI, XXII, XXIII, XXVII, XXVIII and XXXI, in that said findings are not supported by the evidence before the Court and that the facts therein found relate to a proposed additional tax for the calendar year 1918 and not to any taxes paid for the year 1917.

X.

The Court erred in adopting its findings of fact numbered XXIV, in that the evidence before the Court discloses that the claim for refund in the sum of $17,764.08 filed on April 25, 1929, was an original claim for refund filed more than five years after the taxes involved had been paid and was not an amendment or revision of any claim for refund previously filed for taxes paid for the calendar year 1917.

XI.

The Court erred in refusing to adopt the findings of fact and conclusions of law requested by the defendant, in that the same were in accordance with and required by the evidence before the Court.

Summary of Argument.

I.

The filing of a proper and timely claim for refund and the institution of suit within the prescribed period after a rejection thereof are steps essential to the *jurisdiction* of the Court in a case of this kind. The sovereign may not be sued except upon its consent, and then only upon the conditions under which it has consented to be sued.

When applicable legal principles are applied to admitted facts of record, the conclusion is inevitable that there was no further consideration by the Commissioner of the 1917 case after the final redetermination in February, 1923, and the enforced collection of the additional tax so determined in May, 1923. To rebut this evident finality, the taxpayer relies upon the two flimsy theories that (1) some unnamed subordinate to the Commissioner orally told its representative in December, 1922, that the 1917 case would be held in abeyance pending review of subsequent years, and (2) that the 1924 protest brief amounted to a request for reconsideration of the 1917 case, which was acted upon by the Commissioner.

As to the first theory, the subsequent physical facts definitely show that such an oral statement was not authorized by the Commissioner. In February, 1923, the taxpayer was duly advised of the final redetermination of the 1917 taxes, and in May, 1923, a request based upon the alleged oral assurance was officially denied and full settlement of the 1917 taxes was thereupon enforced.

Now, as to the second theory, that the consideration of the 1924 protest brief amounted to a reopening of the 1917 case: While the telegram sent to the taxpayer in May, 1923, stated that a further conference might be

arranged on the 1917 case if a formal protest were filed (and the case might well have been reopened if any new and material facts had been forthcoming), the answer is that no such protest was made. There was a delay of about a year before any further document was filed by the taxpayer. Even if that protest brief had specifically requested a reopening of the 1917 case, such reopening would not necessarily have followed, since it is apparent that the grounds therein outlined were the same as had already been presented to and rejected by the Commissioner for 1917. However, a full study of the record discloses that the 1924 protest brief was directed at the 1918 taxes which had not yet been finally assessed, rather than the 1917 taxes, which had not only been assessed but fully paid.

Moreover, the original claim for refund itself was premature, since there was an additional assessment of the $6,300 item which had not been paid when the claim for refund of the $9,800 item was first filed. Of course, the filing of the 1929 claim for refund and its subsequent rejection was of no legal significance unless the matter was still open and under consideration of the Commissioner.

II.

The court below found that when the tax here in question was redetermined by the Commissioner, it was computed under the special assessment provisions of Section 210 of the Revenue Act of 1917. It is now settled that the determination by the Commissioner of a taxpayer's

liability for profits taxes under the comparable special assessment provisions of the Revenue Act of 1918 (Sections 327 and 328) precludes judicial review either of the amount of the profits taxes or of the amount of the income tax so determined. The same should be true, and, we submit, it is true where the tax for the year 1917 has been determined by the Commissioner pursuant to the special assessment provisions of Section 210 of the Revenue Act of 1917.

The taxpayer places great emphasis upon the finding of the court below that it did not request or acquiesce in the special assessment. Neither the Revenue Act of 1917 nor of 1918 in any way made the imposition of the special assessment provisions dependent upon the request for application thereof by the taxpayer. In both acts, the imposition of the special assessment provisions is mandatory where the Commissioner was then unable to determine the taxpayer's invested capital.

Thus, once we have the proper application of the special assessment provisions (whether predicated upon the request of the taxpayer or upon direction of Congress) the consequences are to be governed by the same legal principles. Accordingly, it is immaterial that this case arose under the 1917 Act and involved no request by the taxpayer for the special assessment. The Supreme Court decisions are equally applicable to the case at bar.

ARGUMENT.

I.

The Claim Is Not a Timely One.

The Court erred in overruling and denying the defendant's motion for judgment for the reason that there was no substantial or sufficient evidence before the Court upon which to predicate a judgment for the plaintiffs and from said evidence the Court should have concluded, held and found as follows:

1. That no action for the recovery of any part of the sum of $11,870.88 paid by the Trumble Refining Company on June 14, 1918, as income and excess profits taxes for the calendar year 1917, was commenced within five years from the payments of said tax or any part thereof, nor within two years from December 13, 1921, the date upon which the Commissioner of Internal Revenue rejected the claim for refund filed by the taxpayer on July 2, 1920, and that the plaintiffs herein are barred by the provisions of Section 3226 of the Revised Statutes of the United States from recovering any part of the said tax paid on June 14, 1918;

2. That no claim for the refund of the sum of $6,213.83, paid by the Trumble Refining Company on May 22, 1923, as additional income and excess profits taxes for the calendar year 1917 was filed within five years from the payment of said tax or any part thereof, and that the plaintiffs herein are barred by the provisions of Section 284(b) (1) (2) of the Revenue Act of 1926 from a recovery in this action of any part of said tax paid on May 22, 1923.

The filing of a proper and timely claim for refund and the institution of suit within the prescribed period after a rejection thereof are steps essential to the *jurisdiction* of the Court in a case of this kind. The sovereign may not be sued except upon its consent, and then only upon the conditions under which it has consented to be sued. The filing of a proper claim after the payment of the taxes in question as a prerequisite to a suit is a familiar provision of revenue laws. The necessity for filing such a claim is not dispensed with because the claim may be rejected. "* * * it is not within the judicial province to read out of the statute the requirement of its words." (*United States v. Felt & Tarrant Co.,* 283 U. S. 269, 273.) In that case the Supreme Court refused to allow a claim for abatement to serve as a claim for refund. See also to the same effect, *Rock Island etc. R. R. v. United States,* 254 U. S. 141.

A further principle is that a belated second refund claim can not serve to bring about a reopening of the barred claim, even though the Commissioner had considered and rejected such second claim. In *B. Altman & Co. v. United States,* 40 Fed. (2d) 781 (C. Cls.), certiorari denied, 282 U. S. 863, the Court said (p. 784):

> "The second refund claim, filed almost four years after the first, raises no new issue, involves no additional assessment made subsequent to the filing and denial of the first, and could not by any possibility occasion a reopening of plaintiff's tax liability; and while the Commissioner may not be in a position to forestall the filing of duplicate claims for refund, section 3226, Revised Statutes, manifestly does not contemplate the repetition of contentions for refund in such a way and at such times as to toll the running

> of the limitation period. The purpose of limiting suits to recover alleged illegal tax exactions is evident, and if plaintiff by repeating its contentions in two refund claims may establish jurisdiction to sue, despite the limitation prescribed in the law, litigation would be prolonged indefinitely. The act of the Commissioner in rejecting the second refund claim is without legal significance, for when it was filed and afterwards rejected plaintiff's right to sue had lapsed by limitation."

It now seems appropriate to outline briefly the pertinent facts in this case. For the year in question, 1917, the taxpayer originally returned a taxable income of some $89,000, on which a tax in excess of $11,000 was paid in 1918. In February, 1920, the Commissioner advised that a recomputation showed an additional tax of some $6,300 was due. In June, 1920, the taxpayer filed an amended return claiming that it should be allowed a deduction for depreciation of approximately $54,000, and on that theory filed not only an abatement claim as to an additional $6,300, but a refund claim for approximately $9,800 of the original tax paid. Both of these claims were rejected by the Commissioner in December, 1921.

Following a demand for payment of the additional $6,300 in January, 1922, the taxpayer again asked an abatement, and in February, 1922, it filed a protest brief dealing not only with its 1917 contentions, but also with subsequent years. A current report of the revenue agent recommended an additional assessment of some $40,000. Taxpayer's representative had a conference in December, 1922, with an unnamed official of the Bureau of Internal Revenue, who, allegedly, stated that the 1917 taxes would be held in abeyance pending final determination of the years

1918 to 1920. Since the time was about to expire, and the Commissioner had not yet acted upon the revenue agent's recommendation of additional assessment, a waiver was requested and obtained from the taxpayer extending the time within which to make such additional assessment as to 1917. However, the Commissioner subsequently decided not to make such additional assessment, and in February, 1923, advised the taxpayer [R. 150] that a redetermination of its taxes for 1917 had resulted in an overassessment of $151.17, which was thereupon duly scheduled [R. 151]. This, we submit, is the final action by the Commissioner as to the 1917 assessment. It is true that the taxpayer subsequently requested, by letter in February, 1923, and by telegram in May, 1923, that such redetermination be held in abeyance, but the only response of the Commissioner was by telegram in May, 1923, advising the taxpaper that collection of the 1917 taxes could not be withheld, but that if a formal protest was filed as to such year, a further conference might be had.

Accordingly, the $6,300 additional assessment was paid by the taxpayer in May, 1923, but the formal protest as to 1917 was not forthcoming. It is the Government's position that there had at this time been a final rejection of all claims, followed by a full payment of that year's taxes, and that with reference to 1917 there was no act by either party of legal significance after that time. Accordingly, when in 1929 the taxpayer had finally prevailed before the Board in a subsequent tax year, involving among others the claim for deduction, it was too late for the taxpayer to revive by a so-called amended claim for refund the 1917 case long since barred by a lapse of time.

The protest brief filed by the taxpayer in 1924 [R. 252] was not filed pursuant to the Commissioner's telegram

dealing with 1917 taxes. A year had now elapsed since those taxes were paid. The correspondence between the parties leading up to this 1924 protest brief, which will be referred to in detail subsequently, clearly shows that the parties were dealing specifically with proposed additional taxes for 1918.

When applicable legal principles are applied to admitted facts of record, the conclusion is inevitable that there was no further consideration by the Commissioner of the 1917 case after the final redetermination in February, 1923, and the enforced collection of the additional tax so determined in May, 1923. To rebut this evident finality, the taxpayer relies upon the two flimsy theories that (1) some unnamed subordinate to the Commissioner orally told its representative in December, 1922, that the 1917 case would be held in abeyance pending review of subsequent years, and (2) that the 1924 protest brief amounted to a request for reconsideration of the 1917 case, which was acted upon by the Commissioner.

As to the first theory, the subsequent physical facts definitely show that such an oral statement was not authorized by the Commissioner. In February, 1923, the taxpayer was duly advised of the final redetermination of the 1917 taxes, and in May, 1923, a request based upon the alleged oral assurance was officially denied and full settlement of the 1917 taxes was thereupon enforced. It is hard to see how the taxpayer, in the face of these vital facts, could still claim that the 1917 case was being held in abeyance by the Commissioner. Furthermore, the oral assurance by the unnamed subordinate was obviously not authorized. In *Ritter v. United States,* 28 Fed. (2d) 265 (C. C. A. 3d), an oral assurance by one of the Commissioner's agents assigned to the case that an overpayment

had been found and would be refunded as a matter of course in due time was held not to relieve the taxpayer of the necessity for filing a formal claim for refund, as the statute required. The Court pointed out that the statutory requisites for suit against the sovereign are very specific and can not be waived by informal action of a subordinate. On the strength of this decision, the Court, in *Hawkins v. United States,* 14 Fed. Supp. 429 (W. D. Pa.), held that certain oral statements between the taxpaper and an unidentified representative of the Commissioner had no evidential value as to claims for refund.

Now, as to the second theory, that the consideration of the 1924 protest brief amounted to a reopening of the 1917 case: While the telegram sent to the taxpayer in May, 1923, stated [R. 26] that a further conference might be arranged on the 1917 case if a formal protest were filed (and the case might well have been reopened if any new and material facts had been forthcoming), the answer is that no such protest was made. There was a delay of about a year before any further document was filed by the taxpayer. Even if that protest brief had specifically requested a reopening of the 1917 case, such reopening would not necessarily have followed, since it is apparent that the grounds therein outlined were the same as had already been presented to and rejected by the Commissioner for 1917. However, a full study of the record discloses that the 1924 protest brief was directed at the 1918 taxes which had not yet been finally assessed, rather than the 1917 taxes, which had not only been assessed but fully paid. Though the brief made a passing reference in the opening statement [R. 253] to the 1917 taxes, as well as the 1918 taxes, the first paragraph of the outline of the brief shows that it dealt specifically with an

appeal to the Committee on Appeals and Review from the contentions of the income tax unit set forth in a memorandum dated January 14, 1924, which [R. 322] was concerned only with the 1918 taxes. The taxpayer's letter transmitting the protest brief was directed to the chairman of the Committee on Appeals and Review and made reference to the appeal pending before the Committee "in connection with the proposed assessment of additional income and profits taxes for the year 1918." [R. 252.] As to that and subsequent years, which were still open, the Committee made certain recommendations and on November 6, 1924, the Commissioner issued notices of deficiencies for the years 1918, 1919 and 1920 [R. 286], whereupon the taxpayer filed an appeal with the newly created Board of Tax Appeals.

It seems quite evident that the proceedings before the Committee were concerned with the years 1918, 1919 and 1920. There was no further consideration by the Committee of the 1917 taxes, and certainly none is shown by any other representative of the Commissioner. Even if the Committee had taken upon itself the task of reconsidering the 1917 taxes, such action would have been ineffective because the Committee had no authority to deal with any years other than the one specifically referred to it. See in this connection *Boyce v. United States,* 21 Fed. Supp. 274 (C. Cls.), certiorari denied, October 13, 1938. There, the Commissioner referred to the Special Advisory Committee in the Bureau of Internal Revenue a pending appeal for 1923. There, as here, the same ground for refund was involved as had been asserted and rejected in prior years, *i.e.,* the allowability of depreciation deductions. In considering the case referred to it for action, the Committee obtained the files and the claims for refund

in the previous years and even went to the extent of having a recomputation made for such prior years. In the suit ultimately brought by the taxpayer, for the taxes paid in such prior years, the taxpayer claimed that such consideration by the Committee constituted a reopening of the old claims for refund so as to remove those prior years from the bar of the statute of limitations. The Court concluded that the Committee was authorized to consider only such matters as were specifically delegated to it. Accordingly, no legal significance attached to its action in consulting claims for prior years.

In the case at bar, the 1917 tax had been finally determined after investigation and conferences, and the full payment of the tax had been required. The taxpayer might have proceeded by timely suit in the Federal courts to enforce a refund of such payment, but it did not do so. Although the final action had been taken on this tax year in May, 1923, when the Commissioner refused to withhold collection, the taxpayer made no further move for nearly six years, when in April, 1929, it, in effect, asked the Commissioner to reopen the old 1917 claim and allow the refund in view of the decision which the Board of Tax Appeals had just rendered in its favor as to subsequent years. [R. 157.] In July, 1930, the Commissioner notified the taxpayer of the rejection of such request. [R. 164.] In the taxpayer's letter of August 5, 1930 [R. 311], we find no contention that the old claim for refund for 1917 was still open and under consideration, but merely a plea that in view of the Board's decision the Commissioner should now reopen the barred claim for the reason that related claims for subsequent years were dealt with by the Board decision and a compensating adjustment was necessary for 1917 under T. D. 4235 [Appen-

dix, *infra*]. On November 3, 1930, the taxpayer was advised that T. D. 4235 was not applicable to the case at bar. [R. 314.]

It will be recalled that the amount now sought was paid at two different times: (1) The $9,800 item was paid in 1918, and (2) the $6,300 item was paid in 1923. The case might be divided into two parts, the first being concerned with the right to the $9,800 item, and the second to the effectiveness of the claim to the return of the $6,300 item. The foregoing discussion takes care of the $9,800 item, as to which a claim for refund was filed after payment thereof. However, there is an additional reason why the $6,300 item can not be refunded.

As already pointed out, the only claim for refund ever filed in this case, prior to the belated claim in 1929, was filed in 1920, at which time the $6,300 item had not yet been paid. A separate abatement claim was filed as to this item, but it was later rejected and a payment of the item was required in May, 1923. An abatement claim can not be treated as an informal claim for refund so as to support a suit. (*Rock Island etc. R. R. v. United States, supra.*) A sufficient claim for refund must be filed *after* the payment of the item in controversy. As already pointed out, the only formal action taken by the taxpayer after this payment was the protest brief filed in 1924 with the Committee on Appeals and Review after notice that the *1918 tax year* had been assigned to it for consideration. The taxpayer had already been notified that the Committee was authorized to consider only the 1918 taxes. [R. 322.] In fact, the antecedent request of the taxpayer for such a review referred solely to the tax year 1918. [R. 329.] Obviously, this protest brief filed for the specific purpose of contesting the 1918 taxes before the

Committee, authorized by the Commissioner to hear this particular claim, could not constitute a claim for refund as to the 1917 taxes or any part thereof. O. D. 709, Appendix, *infra,* outlines the procedure for the reference to the Committee of specific cases. In *Williamsport Co. v. United States,* 277 U. S. 551, the Supreme Court recognized the nature of the Committee's work, regarding it as an informal predecessor of the Board of Tax Appeals. Surely, it must be recognized that the Board of Tax Appeals has authority to consider and act upon only those tax years properly before it. It is immaterial that the Committee had the old files and protests bearing upon the 1917 case before it for comparison and study, as the taxpayer's representative testified in an effort to show actual reconsideration by the Commissioner. A mere re-examination of the files and papers, even by the Commissioner himself, is not sufficient to constitute a reopening and reconsideration. (*R. J. Ederer Net & Twine Co. v. United States,* 7 Fed. Supp. 282 (C. Cls.).) The material point here is that the Committee was authorized to make recommendations only as to 1918, so it could not reopen the 1917 case, even if it tried to, and the record is bare of any effort to do so. Furthermore, even if the 1924 protest brief had effectively embodied the 1917 claim, reference to such outside year would be just so much waste motion, just as it would be in a case before the Board or a Court.

There was nothing to revive or reopen as to the $6,300 item, for it was paid after the old claim was filed, and no other claim for refund had been filed subsequent to its payment.

In the recent case of *Riverside Hospital v. Larson* (S. D. Fla.), decided October 14, 1938, not officially reported but found in 1938 C. C. H., Vol. 4, paragraph 9542,

the rule is laid down that the suit was premature where it was based upon a claim for refund filed before full payment of the tax in question. This brings us back to the Supreme Court ruling referred to above that the statute contemplated a proper refund claim *after* payment of the tax. This, of course, means payment of the full tax as assessed by the Commissioner. This is brought out by the decisions holding that the limitations period runs from the payment of the last portion of the tax. In *Hills v. United States,* 50 Fed. (2d) 302 (C. Cls.), the original tax of $18,000 had been paid in 1921. A deficiency of $1,700 was paid in 1925. Section 3228 of the Revised Statutes provides that all claims for refund of taxes must be presented to the Commissioner within four years "after the payment of such tax." The Court of Claims held that the payment of such tax meant the payment of the entire tax liability involved; that satisfaction of such liability was not made until 1925; and that therefore a claim for refund filed in 1928 was timely. See also *San Joaquin Light & Power Corp. v. McLaughlin,* 65 Fed. (2d) 677 (C. C. A. 9th).

On this theory, the original claim for refund itself was premature, since there was an additional assessment of the $6,300 item which had not been paid when the claim for refund of the $9,800 item was first filed. Of course, the filing of the 1929 claim for refund and its subsequent rejection was of no legal significance unless the matter was still open and under consideration of the Commissioner. (*B. Altman & Co. v. United States, supra.*)

The fact that a written protest was filed subsequent to the payment (even if it had been directed at this particular year) does not eliminate the necessity of filing an appropriate claim for refund as to the pertinent item. (*Oliver*

Typewriter Co. v. United States, 14 Fed. Supp. 543, 549 (C. Cls.).) "* * * the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded." (*United States v. Felt & Tarrant Co., supra,* p. 272.)

There is no basis for the taxpayer's contention that there was no final rejection of the original claim for refund. It was specifically rejected in December, 1921, and the abatement claim was rejected at the same time. Even if we assume that there was an informal reconsideration of such action, there was a very emphatic denial of further relief, except as to the nominal sum of $150, when the additional assessment was collected in May, 1923, over the telegraphic protest of the taxpayer. We submit that at least from that time on the 1917 assessment was closed so far as the Commissioner was concerned. Any further action on his part dealt solely and specifically with the subsequent tax years 1918 to 1920. This is very definitely substantiated by the correspondence between his office and the taxpayer leading up to the reference of the 1918 case to the Committee on Appeals and Review, and the consequent filing of the protest brief before the Committee in this matter by the taxpayer. The Bureau document [R. 323] referring the matter to the Committee clearly shows that the Committee was authorized to consider only the tax year 1918. Even if we assume, *arguendo,* that the 1924 protest brief made sufficient reference to 1917 to constitute a request for reopening, it must be remembered that it was made to the Committee, rather than to the Commissioner. The Committee was not authorized to reopen closed cases, but only to make administrative recommendations as to cases specifically referred to it. Anyway, the Committee did not consider the protest brief as

referring to any but the 1918 taxes, and in its final recommendation did not attempt to go back of the year 1918. Thus, the Committee not only was not authorized to reconsider the 1917 taxes, but it made no attempt to do so.

We have no action at all from the Government's angle on the 1917 taxes after the enforced collection of the additional deficiency in May, 1923. It will be recalled that even the vague assurances of an unnamed subordinate that the 1917 case would be held in abeyance took place back in 1922, sometime before the final redetermination and the ultimate enforced collection of the additional deficiency. We submit that there is nothing in the record to support the lower court's conclusion that the 1917 case was reopened and held in abeyance pending the final outcome of appeals in later years. We find absolutely no action by the Commissioner following the collection of the 1917 taxes in 1923, except as was directed specifically at 1918 and subsequent tax years. It must be remembered in this connection that the concept of separable tax years is fundamental in our income tax system. The only action we find by the taxpayer after the final payment of the 1917 taxes was the protest brief filed with the Committee on Appeals and Review which, as already pointed out, was pursuant to a specific appeal of the 1918 case.

Where, then, is the authority for the Commissioner in 1929 to revive a claim which was rejected in 1921 and on which the final payment was made in 1923? Congress has very emphatically limited the authority to cases in which timely action is taken by the taxpayer. To permit the 1917 case to be kept alive because the taxpayer was still protesting the taxes assessed for subsequent years would vitiate any statute of limitations enacted by Congress and would vitiate the fundamental concept in tax law of the separable tax years.

II.

The Tax in Question Was Determined by Special Assessment and Is Not Subject to Review.

The Court erred in rendering judgment against the defendant and in favor of the plaintiffs in the amount $33,575.01, together with interest, for the reason that the Court had no jurisdiction of the subject matter of this action, the tax sought to be recovered having been assessed under the special assessment provisions of Section 210 of the Revenue Act of 1917.

The court below found [R. 45] that when the tax here in question was redetermined by the Commissioner, it was computed under the special assessment provisions of Section 210 of the Revenue Act of 1917. [Appendix, *infra.*] It is now settled that the determination by the Commissioner of a taxpayer's liability for profits taxes under the comparable special assessment provisions of the Revenue Act of 1918 (Sections 327 and 328) precludes judicial review either of the amount of the profits taxes (*Heiner v. Diamond Alkali Co.,* 288 U. S. 502), or of the amount of the income tax so determined (*Welch v. Obispo Oil Co.,* 301 U. S. 190). The same should be true, and, we submit, it is true where the tax for the year 1917 has been determined by the Commissioner pursuant to the special assessment provisions of Section 210 of the Revenue Act of 1917. (*Joseph Joseph & Bros. Co. v. United States,* 71 Fed. (2d) 389 (C. C. A. 6th), certiorari denied, 293 U. S. 600. Cf. *Central Iron & Steel Co. v. United States,* 6 Fed. Supp. 115 (C. Cls.), certiorari denied, 293 U. S. 563.) The taxpayer places great emphasis upon the finding of the court below [R. 55] that it

did not request or acquiesce in the special assessment. Neither the Revenue Act of 1917 nor of 1918 in any way made the imposition of the special assessment provisions dependent upon the request for application thereof by the taxpayer. In both acts, the imposition of the special assessment provisions is mandatory where the Commissioner was then unable to determine the taxpayer's invested capital. In addition to this, Section 327 of the Revenue Act of 1918 made the imposition of special assessment mandatory where the taxpayer was a foreign corporation. In *Welch v. St. Helens Petroleum Co.*, 78 Fed. (2d) 631, this Court rejected the taxpayer's contention that the reviewability of the Commissioner's action must be predicated upon a request for or acquiescence in the special assessment. There, the taxpayer pointed out that since it was a foreign corporation and the use of the special assessment was mandatory, the Supreme Court decisions denying reviewability were inapplicable. It further pointed out in that case, as here, that the taxpayer was not questioning the comparatives used or the rate fixed by the Commissioner, but only questioned the proper base upon which the tax should be computed, namely, the amount of net income. In rejecting the taxpayer's argument, this Court pointed out that (pp. 635-636):

> "The court cannot determine what would be the effect upon the total tax of a change of the amount of net income. That question lies in the discretion of the Commissioner, and, so far as we know, a change of the net income might result in a corresponding change in rate. While it may be true in the case at

> bar that the Commissioner would have selected the same rate whether or not he allowed the relatively small deduction of the British tax, it is obvious that the rate of taxation might be materially changed by the Commissioner by reason of the comparisons with other corporations and taxpayers required to be made by him in fixing the amount of tax."

A profits tax computation under Section 210 of the Revenue Act of 1917, is, indeed, *based upon a comparison* with a group of representative concerns engaged in a like or similar trade or business. The Commissioner, as a very first step, when unable satisfactorily to determine invested capital, selects concerns which, in his judgment, are proper comparatives and then determines a deduction for the taxpayer corporation which (before the addition of the statutory $3,000) bears the same ratio to the taxpayer's net income that the average deduction of the comparatives (before addition of $3,000) bears to the average net income of the comparatives. The deduction determined for the taxpayer under Section 210, the Commissioner then computes a constructive invested capital for the taxpayer, also by a comparative method, of course using the same corporations which he has just used in determining the taxpayer's proper deduction. See Regulations 41, Article 18, Appendix, *infra*. With deduction and constructive capital thus determined and with net income already determined, the Commissioner is then prepared to compute the taxpayer's profits tax liability. The computation is then made at the rates prescribed by

Section 201, using the deduction determined by comparison, as heretofore described, plus $3,000 (Sec. 210), and also using the determined constructive invested capital. That is the method prescribed by Section 210 (in conjunction with Secs. 201 and 1005) of the Revenue Act of 1917 for determining a tax liability for the year 1917 by what, in common speech, is known as "special assessment."

The similarity of the special assessment procedure under the 1917 and 1918 Acts is established in *Joseph Joseph & Bros. Co., supra.* It, too, was a suit for refund of tax paid for 1917 by a taxpayer whose liability had been computed and determined under Section 210 of the 1917 Act. In that case, the Court said (p. 391):

> "* * * section 210 and sections 327 and 328 are so similar in purpose and in the procedure provided as to compel the conclusion that the District Court has no more authority to review the action of the Commissioner under one section than under the other."

Cf. *McDonnell v. United States,* 59 Fed. (2d) 290 (C. Cls.), affirmed without discussion of this issue, 288 U. S. 420. Cf., also, *Cleveland Automobile Co. v. United States,* 70 Fed. (2d) 365, certiorari denied, 293 U. S. 563; *Welch v. Obispo Oil Co., supra; Williamsport Co. v. United States, supra; Heiner v. Diamond Alkali Co., supra.*

The similarity of the 1917 provisions with the 1918 provisions is further borne out by the following excerpt from

the decision in *Central Iron & Steel Co. v. United States, supra,* which involved the 1917 provisions (at page 116):

> "Upon careful consideration thereof we are of opinion that the court is without jurisdiction in any case where the Commissioner has allowed special assessment and determined the tax under the special assessment section of the statute when the result of the court's decision, if in favor of the plaintiff on the question presented, would alter or abrogate the Commissioner's determination under the special assessment provision, or necessitate further consideration by the Commissioner for the purpose of determining whether the profits tax rate theretofore fixed under the relief provisions should be increased or decreased, or whether the decision of the court on the question concerning the correct income had removed the abnormality upon the basis of which special assessment had been allowed. While the last-mentioned feature would not be presented in a case like the one at bar, involving 1917, where the only ground for special assessment is the inability satisfactorily to determine invested capital, *the principle is the same whether the case arises under the act of 1917 or 1918, for the reason that net income is one of the principal factors* in determining the constructive invested capital and amount of the profits tax." (Italics supplied.)

Obviously, the special assessment provisions of the Revenue Act of 1918 add to the grounds for special assessments specified in the 1917 Act. In certain of the grounds enumerated in the 1918 Act, the request on the part of the

taxpayer is anticipated, but in the 1917 Act, as well as in the portion of the 1918 Act dealing with foreign corporations, no such request was contemplated by Congress. The choice of action was vested in the Commissioner and under the specified conditions, the special assessment provisions were made applicable. Thus, once we have the proper application of the special assessment provisions (whether predicated upon the request of the taxpayer or upon direction of Congress), the consequences are to be governed by the same legal principles. Accordingly, it is immaterial that this case arose under the 1917 Act and involved no request by the taxpayer for the special assessment. The Supreme Court decisions are equally applicable to the case at bar. We submit that the taxpayer here must fail as it did in *Welch v. Obispo Oil Co., supra,* where the Supreme Court observed (p. 196):

> "* * * the taxpayer's true net income is an essential factor in the determination of his liability under §§327 and 328 [of the 1918 Act]; and it follows that the making of the special assessment precludes review by a court of the income tax [and the amount of net income] determined."

The taxpayer and the court below relied upon the case of *McKeever v. Eaton,* 6 Fed. Supp. 697 (Conn.). We submit that this case is unsound and out of line with the Supreme Court authorities. In *Con P. Curran Printing Co. v. United States,* 14 Fed. Supp. 638 (C. Cls.), certiorari denied, 301 U. S. 686, the court refused to follow

the *McKeever* case in view of the recent Supreme Court decisions. There, the court said (p. 646):

> "Plaintiff calls attention to the fact that it does not seek to change the rate of the tax as fixed by the Commissioner under the special assessment, and contends that, as it does not seek to alter the rate, it is not precluded from showing that the Commissioner made errors in his calculation of the amount of net income. Several cases are cited in support of this contention of plaintiff. With one exception, the facts were quite different, and the courts did not have before them the question now involved. Some statements were made in *McKeever v. Eaton* (D. C.) 6 F. Supp. 697, that may seem to support this contention, but they do not accord with the rule laid down by the Supreme Court which has been followed by this court. In the case of *Heiner v. Diamond Alkali Co.*, 288 U. S. 502, 506, 53 S. Ct. 413, 414, 77 L. Ed. 921, it was said that the allowance of a special assessment was a matter of administrative discretion and that 'the Commissioner cannot make an administrative finding upon the question for decision under section 327(d) or that under 328 until he has determined the net income of the taxpayer.' "

Conclusion.

The ultimate findings of the court below, which are pertinent for purposes of this appeal, are not supported by the record. The conclusions of law are clearly erroneous. The judgment below should be reversed for two reasons: (1) The claim is barred by the lapse of time, and (2) it involves a special assessment, which is not reviewable.

Respectfully submitted,

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January, 1939.

APPENDIX.

Revenue Act of October 3, 1917, c. 63, 40 Stat. 300:

SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

SEC. 213. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all necessary regulations for carrying out the provisions of this title, and may require any corporation, partnership, or individual, subject to the provisions of this

title, to furnish him with such facts, data, and information as in his judgment are necessary to collect the tax imposed by this title.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1112. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in sections 284 and 319 of the Revenue Act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. (U. S. C., Title 26, Sec. 1433.)

* * * * * * * * *

SEC. 1113 (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the ex-

piration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail." (U. S. C., Title 26, Sec. 1672.)

Treasury Regulation 41, relative to the War Excess Profits Tax Imposed by the War Revenue Acts of October 3, 1917:

Art. 18. Constructive Capital for Application of Rates.—Where the deduction allowed to a taxpayer is determined under article 24, the invested capital for the purpose of applying the rates of taxation under article 16 shall be deemed to be an amount which bears the same ratio to the net income of the trade or business for the taxable year which the average invested capital for the corresponding calendar year of representative corporations, partnerships, and individuals engaged in a like or similar trade or business bears to their average net income.

The Commisisoner of Internal Revenue in determining for any calendar year the ratio which the average invested capital of representative corporations, partnerships, and individuals engaged in any particular trade or business bears to their average net income, will include the invested capital and net income of representative corporations and partnerships for fiscal years ending during such calendar year. * * *

Art. 24. When Invested Capital Can Not Be Satisfactorily Determined.—If the Secretary of the Treas-

ury is unable satisfactorily to determine the invested capital, the deduction shall be the sum of—

(1) An amount equal to the same proportion of the net income of the trade or business for the taxable year as the average deduction (determined in the same manner as provided in article 21 without including the $3,000 or $6,000 therein referred to) for the corresponding calendar year, of representative corporations, partnerships, and individuals engaged in a like or similar trade or business, is of their average net income, plus

(2) In the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States, $6,000.

* * * * * * * * *

In every case of a trade or business having invested capital a return shall be made in the first instance in accordance with article 21 or 23, but the taxpayer may submit therewith a statement of reasons why in his opinion the tax should be assessed in accordance with this article.

O. D. No. 709, 3 Cumulative Bulletin 370:

SECTION 1301.—ADVISORY TAX BOARD. (COMMITTEE ON APPEALS AND REVIEW.)

SECTION 1301, ARTICLE 1702: Procedure before Advisory Tax Board. (Committee on Appeals and Review.)

43-20-1272
O. D. 709

A RULE FOR PROCEDURE ON APPEALS FROM THE INCOME TAX UNIT.

When an appeal is taken from a ruling of the Income Tax Unit to the Committee on Appeals and Review or a question is certified to that Committee at the request of

the taxpayer and an oral presentation is desired, the record shall immediately be examined to ascertain as to whether there is a question of law involved. If it is found that a question of law is involved, the Solicitor shall be notified and he will thereupon designate one member of the Solicitor's office to sit with the Committee and himself for the purpose of hearing the appeal, or if the Solicitor finds it inconvenient to sit with the Committee he may designate two members of his office to do so.

At the hearing before the Committee the taxpayer or his attorney or representative will be expected to make his full oral argument on the law as well as the facts, and this presentation shall be the only oral presentation except in unusual circumstances, or unless a further argument of the facts or the law is deemed desirable by either the Chairman of the Committee or the Solicitor.

The attorney or attorneys so designated by the Solicitor for the hearing will be expected, in conjunction with the Solicitor and the Conference Committee in the Solicitor's office, if the Solicitor so desires, to consider the legal aspects of the case, and the Solicitor's recommendation in the form of an opinion or memorandum will then be made to the Chairman of the Committee, and thereupon the Committee's findings shall be prepared and submitted to the Commissioner for his approval.

In any case of appeal there shall be filed with the Committee, either at the time of filing the appeal or on or before the date set for oral presentation, if oral argument is desired, a succinct written statement of the essential facts which the taxpayer desires to have considered in connection with his appeal, duly sworn to.

If the taxpayer, his attorney, or representative does not wish an oral argument, his argument may be made in the form of a written statement or brief which should be filed at the time the appeal is submitted to the Committee. If an oral presentation is to be made, the taxpayer, his attorney, or represenative may in addition thereto file such brief or briefs as he may desire. These briefs, not less than three copies of which should be furnished, may be either printed or typewritten, and where practicable should be filed not less than three days before the appeal is to be heard. Additional briefs may be filed at the time of or subsequent to the hearing within the time prescribed for the particular case by the Committee.

T. D. No. 4235, VII-2 Cumulative Bulletin 76:

I. Claims Disallowed Prior to May 29, 1928, in Which the Period of Limitation for Bringing Suit Has Expired.

(*a*) If a claim for refund or credit of an internal revenue tax was disallowed prior to May 29, 1928, and if the period of limitation for bringing suit in court has expired, such claim will be reopened if, but only if—

(1) The ruling pursuant to which the claim was disallowed was reversed by the Commissioner of Internal Revenue and an application for reopening was filed after such reversal and prior to the expiration of such period of limitation; or

(2) The refund or credit is properly allowable under a court decision or a decision of the Board of Tax Appeals and a case or an appeal involving the point upon which the refund or credit is allowable was pending after the disallowance of the claim and prior to the expiration of such period of limitation; or

(3) The refund or credit is properly allowable under a court decision or a decision of the Board of Tax Appeals to which the applicant was a party and the adjustment in accordance therewith requires a compensating adjustment (such as an adjustment in inventory, or invested capital, or the shifting of an item of income or loss from one taxable period to another) for one or more other taxable periods, and the application requests the reopening of the case for such other taxable periods; or

(4) The claim is based upon a question of fact and either (a) evidence of such fact was presented, in respect of the taxable year involved, prior to the expiration of such period of limitation, or (b) evidence of such fact was duly presented for another taxable period and an adjustment for such period accordingly made which requires a compensating adjustment (such as an adjustment in inventory, or invested capital, or the shifting of an item of income or loss from one taxable period to another) for one or more other taxable periods, and the application requests the reopening of the case for such other taxable periods, or (c) evidence of such fact was duly presented and a determination made in the closing of a case of another taxpayer and such determination decreases the tax liability of the applicant (such as a corporate distribution and a stockholder's liability in respect thereof, a determination of the distributive share of partners, the liability of a trustee and of a beneficiary, the liability of an estate and a decedent or of an estate and a distributee and the determination of the ownership of property).

(*b*) In no event will any such claim be reopened—

(1) Unless an application for reopening has been filed with the Commissioner of Internal Revenue on or before January 31, 1929; and

(2) Unless the refund or credit is properly allowable; and

(3) Unless the specific ground upon which the refund or credit is allowable was stated in the claim, or in an amendment thereof made prior to the expiration of the period of limitation upon the filing of a claim for refund or credit; and

(4) Unless the application for reopening states specifically the circumstances upon which the application is based.

(*c*) In no event will a refund or credit be allowed except to the extent that it is allowable on the merits without regard to any bar of the statute of limitations upon assessment or collection in respect of the taxable period involved and of each taxable period in which a compensating adjustment should be made; and in no case will the amount of the refund or credit exceed the amount properly refundable in respect of the grounds stated in the claim.

II. Claims Disallowed on or After May 29, 1928.

A case in which the claim was disallowed on or after May 29, 1928, is governed by section 608 of the Revenue Act of 1928, and no such case will be reopened if, under the provisions of such section, a refund would be considered erroneous.

III. Reopening Prior to the Expiration of the Statute of Limitations.

Any claim which has been disallowed will be reconsidered and allowed, at any time prior to the expiration

of the statute of limitations for bringing suit, if it clearly appears that the claim should be allowed on the merits. No reopening or application for reopening will extend the period within which suit must be brought, nor will a reconsideration of a claim be considered as a reopening.

IV. Revocation of Treasury Decision 3240 [C. B. 5, 313].

Treasury Decision 3240 is hereby revoked.

D. H. Blair,
Commissioner of Internal Revenue.

Approved October 23, 1928.

A. W. Mellon,
Secretary of the Treasury.

No. 9038.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for TRUMBLE REFINING COMPANY, a dissolved corporation,

Appellee.

BRIEF FOR APPELLEE.

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In the United States Circuit Court of Appeals

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Appellee.

BRIEF FOR APPELLEE.

Opinion Below.

The District Court's memorandum opinion was filed March 1, 1937 [R. 331-339]. It is not reported.

Jurisdiction.

This case involves income and excess profits taxes for the calendar year 1917. The District Court's judgment in favor of the taxpayer for the full amount claimed, $33,575.01, was entered on May 31, 1938 [R. 59-60]. The petition for appeal and assignment of errors [R. 396-

403] were filed on August 30, 1938, and an order allowing the appeal was filed on August 30, 1938 [R. 404]. This Court's jurisdiction is invoked under Section 128 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. 225.

Questions Presented.

1. Whether a timely suit was instituted after the rejection of a timely claim for refund?
2. Did the Commissioner of Internal Revenue make a final assessment of the taxpayer's excess profits taxes for the calendar year 1917 under Section 210 of the Revenue Act of 1917?
3. Can the Commissioner of Internal Revenue deprive a taxpayer of his right to a judicial review of an assessment of excess profits taxes by imposing an unrequested and arbitrary special assessment under Section 210 of the Revenue Act of 1917?

Statutes Involved.

[See Appendix, pages 45-46.]

Summary of Argument.

I.

The District Court found that the Commissioner never finally rejected the appellee's claim for refund of 1917 income and excess profits taxes until July 25, 1930, and that from June 7, 1920, the date when said claim was filed, until July 25, 1930, both the Commissioner and the appellee carried on negotiations for the settlement of the latter's 1917 tax liability. This action was commenced on July 21, 1932, within two years of the date when the Commissioner finally rejected the claim for refund. The appellant has failed to show that the foregoing findings have no evidence to support them.

The evidence shows that the contested issue involved in the appellee's tax liability for the year 1917 was its right to an annual deduction for depreciation of its patent license agreements. This same issue, necessarily a recurring one, was involved in the determination of the appellee's tax liability for each of the years 1917 to 1920, inclusive. On December 9, 1922, the head of the Bureau's Special Audit Section assured the appellee that its 1917 case would be held in abeyance pending further examination by the Commissioner of the appellee's tax liability for the years 1918 to 1920. Accordingly, the appellee filed with the Department a waiver of the statute of limitations governing the time within which the Commissioner could make an additional assessment for the year 1917. Thereafter, the Commissioner himself confirmed the agreement made by the

appellee and the head of the Special Audit Section and he invited the appellee to a further hearing on its 1917 case.

In acceptance of that offer the appellee filed a brief with the Bureau during May of 1924, in which it argued the points involved in its tax liability for the years 1917 to 1920, inclusive. Subsequently a hearing was had at which the Commissioner's representative had before him the files for those years and the parties argued the depreciation issue which was common to all taxable periods. Thereafter, the Committee on Appeals and Review determined that the appellee was entitled to an annual deduction for depreciation of its patent license agreements and that the March 1, 1913 value thereof was $160,000.00.

The depreciation issue involved in the appellee's 1917 case was likewise involved in its tax liability for the years 1918 and 1920 to 1923, inclusive. With respect to the latter years, the United States Board of Tax Appeals decided on October 30, 1929, that the appellee was entitled to an annual deduction for depreciation and that the fair market value of its patent license agreements on March 1, 1913, was $850,000.00. Thereupon the appellee amended its original claim for refund on April 25, 1929, to include in its prayer for relief an additional amount, namely, $6,365.00 paid on May 22, 1923, in satisfaction of an assessment under Section 210 of the Revenue Act of 1917 proposed by the Commissioner but never finally determined by him. The grounds relied upon by the appellee in its amended claim were the same as those upon which it predicated its right to a refund in its original claim, the only difference between the two being that the latter demanded the refund of a greater amount. Since the amended claim was filed prior to a final rejection by the Commissioner and merely asked for greater relief upon the same grounds

relied upon by it in its original claim, the amended claim was a permissible and timely one.

By a letter dated May 22, 1930, the Commissioner advised the appellee that its claim for refund for 1917 taxes would be rejected, not because the claim was untimely, but because the Commissioner did not acquiesce in the Board's decision for other years. On July 25, 1930, the Commissioner formally rejected the appellee's claim for refund of 1917 income and excess profits taxes. That the Commissioner did not make a final determination of the 1917 case until July 25, 1930, is further evidenced by the fact that it was not until November 3, 1930 that the Commissioner ever indicated that in his opinion the claim for that year was barred by the statute of limitations, although he had prior thereto interposed that defense with respect to other taxable periods.

II.

The argument made by the appellant that the Commissioner's assessment under Section 210 of the Revenue Act of 1917 is not subject to judicial review is entirely inapplicable to this case because here the Commissioner never made a final determination of the appellee's net income, a factor which the Supreme Court has held must be ascertained before a special assessment under that section of the Act can be made. The evidence shows that from the date when the taxpayer filed its claim for refund until July 25, 1930, the Commissioner continued negotiations with the appellee. Throughout that period the principal issue discussed was the appellee's right to a deduction for depreciation of its patent license agreements, a factor which of necessity had to be determined before the appellee's net income could be computed. Since the Commissioner never

finally determined that factor his proposed assessment under Section 210 was premature and invalid.

Section 210 of the Revenue Act of 1917 was enacted as a relief measure for the benefit of taxpayers whose excess profits taxes would be disproportionate under any other type of assessment. The election to invoke that assessment entailed a waiver of the right to a judicial review of the assessment made. Obviously the statute contemplated that the taxpayer should be the one to exercise the election for it was enacted as a special relief measure for his benefit. It is therefore apparent that the Commissioner cannot use that relief section as an offensive weapon to increase the tax over that due without the benefit thereof and by the same act deprive the taxpayer of his right to a judicial review. Thus, even assuming that the Commissioner made a final assessment under Section 210 of the Act (which is denied) still the taxpayer is entitled to recover in this action because it did not request a special assessment. Furthermore, in granting relief to this taxpayer the court has not been called upon to review any discretionary determination made by the Commissioner.

Finally, the evidence clearly shows that the Commissioner's proposed assessment under Section 210 of the Act was arbitrary and capricious for by an application of that section he determined that the appellee's tax liability for the year 1917 actually exceeded its net income by $2,773.23. Nothing but an arbitrary determination could conclude that the liability for taxes measured by net income could exceed the net income, for obviously such a tax amounts to confiscation. It is well established that where an administrative officer abuses his discretion or makes an arbitrary finding, his action in that regard is always subject to a judicial review.

ARGUMENT.

I.

The Action Brought to Recover 1917 Income and Excess Profits Tax Overpaid by Trumble Refining Company in the sum of $16,341.68 Was Timely.

Congress has established a statutory procedure whereby a taxpayer can recover taxes unduly exacted or erroneously paid. That procedure requires the taxpayer to file with the Commissioner of Internal Revenue a claim for refund thereof within four years next after the payment of the tax. Section 284 (b) (1), Revenue Act of 1926 (*infra,* p. 46). Section 3226 of the Revised Statutes (*infra,* p. 45) provides that a claim for refund shall constitute a condition precedent to an action for the recovery of taxes and that no suit for the recovery thereof can be brought later than five years after the date when the tax is paid, or "two years after the disallowance of the part of such claim to which such suit or proceeding relates." The contest in this case centers in part about the interpretation of the above quoted phrase found in the statute.

In the case at bar the appellee was entitled to a deduction in the year 1917 for the exhaustion of the March 1, 1913 value of its patent license agreements. Both the Board of Tax Appeals and the Committee on Appeals and Review have held that the taxpayer was entitled to an annual deduction for the exhaustion of said patents. The decision of the Board of Tax Appeals on that issue [R. 287] is *res adjudicata* and forecloses any denial thereof by the appellant in this case. *Erb et al. Exr's v. U. S.,* 384 C. C. H. 9589 (D. C., N. Y., not yet officially reported). But in any event the District Court in this case held that the taxpayer was entitled to the deduction claimed by it

for the year 1917. The appellant urges no defense on the merits but argues that the appellee's cause of action is barred by the statute of limitations. The rule applicable in such a situation was recently stated by the Third Circuit Court of Appeals in *Allegheny Heating Company v. Lewellyn,* 91 Fed. (2d) 280, 283:

> "It is undisputed that under the determination of the taxpayer's tax liability for the years in question made by the Commissioner on January 15, 1929, the taxpayer had overpaid its taxes and was entitled to the refunds here claimed except for the bar of the statute of limitations. *The equities are, therefore, all with the taxpayer. The rule that tax laws should be construed most strongly in favor of the taxpayer is peculiarly applicable here.* * * *" (Emphasis supplied.)

The Trumble Refining Company in its income tax return for the year 1917 filed in April, 1918, disclosed a net taxable income of $89,469.54 and a tax liability of $11,870.68. In computing the net taxable income no deduction was taken for the patent license agreements. On June 7, 1920, an amended income tax return was filed wherein a deduction for depreciation was taken and a net taxable income shown of $35,348.12. At the same time Trumble Refining Company filed a claim for refund of $9,749.80 [R. 46, 138], the claim setting forth that the Trumble Refining Company was entitled to depreciation on its patent license agreements. As a part of the claim for refund and amended return Trumble Refining Company at the same time filed a claim for abatement of additional taxes in the sum of $6,365.00 which had been assessed by the Commissioner on May 17, 1920, the grounds for the claim for abatement being exactly the same as those in support of

the claim for refund. The reasons given by the Commissioner for making the additional assessment was that he could not determine the invested capital of Trumble Refining Company. The Commissioner, by letter dated December 13, 1921, rejected the claim for refund [R. 46]. Notwithstanding these facts the Commissioner, through his local agent at Los Angeles, made an investigation of the tax liability of the Trumble Refining Company for the years 1917 to 1920, inclusive, and by a report dated in August, 1921, proposed large additional assessments for each of those years. The claim for refund was timely filed and the basis thereof was never changed. The trial court held that the claim for refund for the year 1917 was reopened and reconsidered, and negotiations continued in respect thereof until July 25, 1930.

The principle is now well established that if the Commissioner reopens a case on the merits after he has ruled on it, the statute of limitations does not begin to run until he announces whether he will reject or adhere to his former decision. *McKesson & Robbins, Inc., v. Edwards* (C. C. A. 2), 57 Fed. (2d) 147; *Mobile Drug Co. v. United States* (D. C.), 39 Fed. (2d) 940; *Pierce-Arrow Motor Car Co. v. United States* (Ct. Cl.), 9 Fed. Supp. 577. *American Safety Razor Corp. v. United States* (Ct. Cl.), 6 Fed. Supp. 293; *Jones v. United States* (Ct. Cl.), 5 Fed. Supp. 146. In *Jones v. United States* the court said at page 152:

> "That a reconsideration of a refund claim on the merits constitutes a reopening of the claim is no longer open to doubt. Mobile Drug Co. v. United States (D. C.), 39 F. (2d) 940, and McKesson & Robbins, Inc., v. Edwards (C. C. A.), 57 F. (2d) 147. These cases announce the rule that when the

> Commissioner, upon application made by a taxpayer within the time in which suit could be instituted on a disallowed claim, enters into a reconsideration of the merits of the claim and later makes a decision thereon rejecting the claim, or adheres to his former decision rejecting it, his decision for the purpose of the statute of limitations is in abeyance until he has reached and announced his final decision, and the taxpayer, under section 3226 of the Revised Statutes, as amended (26 U. S. C. A., §156), has two years thereafter in which to institute suit. * * *"

There is adequate evidence in the record to sustain the trial court's finding that the Commissioner did not act with finality upon the appellee's claim until July 25, 1930. On February 1, 1922, the appellee filed with the Commissioner a comprehensive brief of which plaintiff's exhibit No. 3 is a copy. An examination of that brief, which was prepared by the appellee's tax consultant, shows that it dealt with the subject matter of assessment of said taxes against the appellee for the years 1917 to 1920, both inclusive. Therein the appellee protested against the proposed additional taxes for each of the years in question. The principal contention discussed in the brief and the one which the appellee asserted was applicable to each of the years 1917 to 1920, inclusive, was the contention that it was entitled to an annual deduction of $54,121.42 from income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements.

Thereafter on December 9, 1922, the appellee's tax consultant conferred with one of the officials of the Bureau of Internal Revenue who was in charge of the Special Audit Section. He asked for a hearing regarding the 1917 to 1920 taxes, but the official notified him that the

Bureau was not ready to take up the matter of appellee's taxes for all of those years but would hold in abeyance the question of the taxes for 1917 until the remaining years' taxes could also be reviewed [R. 48, 247, 285].

At the request of the Commissioner the Trumble Refining Company on or about February 21, 1920, filed an unlimited waiver of the statute of limitations governing the time within which the Commissioner could make an assessment of additional taxes for the year 1917 [R. 48, 147, 149]. In his request for a waiver the Commissioner advised the taxpayer that he was reluctant to determine the true tax liability "until after a thorough audit and considerable consideration of all the facts in the case had been made." This conclusively establishes the fact that the assessment of additional taxes and his rejection of the claim for refund are based upon a superficial determination of the tax liability.

Although the appellant does not flatly deny that the head of the Special Audit Section of the Bureau assured the appellee that the 1917 case would be held open yet he implies as much [Br. 22, 23]. If no such assurance was given, then why did the appellee execute a waiver extending the time within which the Commissioner could make an additional assessment for 1917? Does it seem probable that the appellee would voluntarily waive a defense for no reason whatsoever? The very fact that the appellee executed that waiver proves conclusively that some assurance was given to it that the 1917 case would be held open for further consideration.

The appellant argues that the assurance given to the appellee by the head of the Bureau's Special Audit Section that the 1917 case would be held in abeyance was not

authorized by the Commissioner. Appellant cites *Ritter v. United States,* 28 Fed. (2d) 265, a case wherein the taxpayer made an oral demand upon a *field agent* for the refund of overpaid taxes. The question in that case was to determine whether or not a field agent could waive the express requirements of Section 1113 of the Revenue Act of 1926, thus making it unnecessary for the taxpayer to file a written claim for refund prior to bringing suit. The court held that since a field agent has no authority to consider or act upon claims for refund his representations with respect thereto would not bind the government.

But the case at bar is not one involving a field agent. Here the agent was the head of the Special Audit Section [R. 48, 284]. He was the agent held out by the Commissioner as the one authorized to represent the Bureau in making a settlement on the claims for refund theretofore filed by this appellee. In *Ritter v. United States, supra,* the court said at page 267:

> "Is the government estopped from setting up the failure of the plaintiff to file a claim by the statement of its field agent that it was not necessary for him to do so? It is true, as plaintiff contends, that when the sovereign becomes an actor in a court of justice, its rights must be determined upon those fixed principles of justice which govern between man and man in like situations. Walker v. United States (C. C.), 139 F. 409; Cook v. United States, 91 U. S. 389, 23 L. Ed. 237; United States v. Flint, 25 Fed. Cas., p. 1107, No. 15,121. *The acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government, if the officers have acted within the scope of their authority.* The field agent in the instant case was not authorized to waive

> the requirements of the statute or the regulations, nor to make rules and regulations in accordance with which overpayments should be refunded. His duty was to audit accounts. He therefore had no authority to tell the plaintiff that he need not observe the requirements of the statute and of the regulations. Therefore the government is not estopped by his unauthorized statements." (Italics supplied.)

Since the Commissioner confirmed the agreement of the Deputy Commissioner and did reopen and reconsider the tax liability for the year 1917, the argument of the appellant regarding the agent's authority is entirely without merit.

It is not disputed that the Commissioner had authority to reopen cases and to thus extend the statutory period within which a claim could be filed. *Jones v. United States,* 5 Fed. Supp. 146; *McKesson & Robbins, Inc., v. Edwards* (C. C. A. 2), 57 Fed. (2d) 147; *Mobile Drug Co. v. United States* (D. C.), 39 Fed. (2d) 940. It therefore follows that it was within the Commissioner's power to hold his agent out to the appellee as having that same authority, and in assigning him to settle the appellee's case he gave his agent authority to do whatever he himself would normally find to be necessary in settling the case. Thus it appears that the promise made by the Commissioner's agent to hold the 1917 case in abeyance until a hearing was had for all years was authorized and was binding upon the appellant.

That the claim was reopened and considered by the Commissioner really cannot be denied.

On February 5, 1923, the Commissioner notified the appellee that he had recomputed the appellee's taxes for

the year 1917 and that he had determined an overassessment in the amount of $151.17. The appellant argues that this was the final action taken by the Commissioner with respect to the appellee's 1917 taxes [Br. 23]. The District Court found to the contrary that the Commissioner reopened the case after having determined the overassessment [R. 54, 55]. The finding of fact so made by the District Court must necessarily stand unless there is no evidence in the record to sustain it. *Grissom v. Sternberger,* 10 Fed. (2d) 764; *Geo. A. Fuller Co. v. Brown,* 15 Fed. (2d) 672; *Cain v. Southern Alkali Corp.,* 95 Fed. (2d) 188.

The evidence, however, shows that after having received the Commissioner's letter of February 5, 1923, the appellee wrote to the Commissioner of Internal Revenue on February 23, 1923, calling his attention to the brief theretofore filed by it and calling attention to a conference had by its tax consultant with the Bureau's official on December 9, 1922, at which conference said official had notified the appellee that the Bureau would hold a hearing on all of the years 1917 to 1920 at one time. In this letter to the Commissioner the appellee requested that he withhold entering the overassessment for the year 1917 in view of these circumstances.

On May 15, 1923, the appellee telegraphed the Commissioner that in view of the understanding reached in the conference of December 9, 1922, and because the questions involved in 1917 affected all years the Commissioner should instruct the local Collector of Internal Revenue to withhold the collection of additional taxes assessed for 1917. In that same telegram the appellee requested that the Commissioner set a date for a conference to be held for the consideration of all taxable years involved [R.

153]. In response to that telegram the Commissioner wired the appellee on May 21, 1923, as follows:

> "Reply telegram fifteenth. No authority to instruct Collector Accept abatement claim to replace claim rejected Conference may be arranged on nineteen seventeen case if formal protest is filed but is impracticable on later years until information submitted is considered and audit completed" [R. 154].

Thereafter in May of 1924 the appellee's tax consultant, acting in its behalf, held a conference with an official of the Commissioner's office. At that conference he delivered to said official a brief, of which plaintiff's exhibit No. 4 is a copy. The appellant argues that the conference held in 1924 was limited to a consideration of the tax for the year 1918 [Br. 7]. However, the brief filed at that conference expressly states in the very heading thereof that it was submitted on an issue concerned in an additional assessment for the year 1917 and proposed additional assessments for 1918 and subsequent years [R. 253]. Nor is that the only indication in said brief that it was concerned with the 1917 case, for under the heading "Depreciation of Patent Rights" the brief states [R. 264-265]:

> "The Unit through its contention as set forth under No. 1, has held that the Trumble Refining Company is not entitled to any depreciation deductions claimed for patent rights or any part of such rights. This contention on the part of the Unit is clearly not in accord with the decision of the Committee as set forth in A. R. M. 35 previously referred to and quoted. It is accordingly respectfully requested that the decision of the Unit on this point be reversed."

It should not be forgotten that the main issue before the Committee on Appeals and Review was the right of Trumble Refining Company to a depreciation deduction based upon the March 1, 1913 value of its patent license agreements. This issue affected alike all years then under consideration.

Furthermore, Mr. Adams, the appellee's tax consultant, stated that when he filed that brief with the Commissioner he held a conference with respect to the years 1917 to 1920, inclusive, and particularly with reference to the issue of whether or not the appellee was entitled to depreciation on its license agreements. At that conference the Commissioner's representatives had the complete file before them, including the file for the year 1917 [R. 248]. The protest filed in 1923 specifically protesting the proposed assessment for 1917 was one of the documents in the hands of the Commissioner's representative at the conference and the 1917 case was involved in the discussion that took place [R. 249].

The appellant offered no evidence conflicting with the testimony given by Mr. Adams, the appellee's witness. In short, the appellant has offered no reason for disbelieving the appellee's witness. Certainly this court will not disturb the District Court's findings which are supported by uncontradicted testimony. In making its findings the District Court was exercising the functions of a jury and its findings are on the same plane as if embodied in a jury's special verdict. *United States v. Jefferson Electric Mfg. Co.,* 291 U. S. 386, 78 L. ed. 859; *Dooley v. Pease,* 180 U. S. 126, 45 L. ed. 457.

The appellant argues that only the 1918 case was formally referred to the Committee on Appeals and Re-

view and that therefore it had no authority to reopen the case for 1917. In support of that proposition it cites *Boyce v. United States,* 21 Fed. Supp. 274 (Ct. Cl.). That case held that the *Special Advisory Committee* was without authority to reopen, for prior years, a case involving the year 1923 referred to it by the Commissioner.

It appears from the findings of facts made in that case that the Special Advisory Committee returned the file therein to the Commissioner with a letter stating that when the claims for the prior years were considered by the Committee it was ascertained that the statute had already outlawed the claims. Thus it appears that the Special Advisory Committee refused to reopen the case on its merits. This was the principal ground relied upon by the court as shown by the following extract from its opinion at page 279:

> "* * * Although this Special Advisory Committee may have considered the refund claims for the purpose of arriving at a settlement of the case before the Board, and, in order to arrive at the amount justly due as deficiency for 1923, it may have been necessary to compute the depreciation for the previous years, nevertheless, the Special Advisory Committee did not recommend to the Commissioner that these claims for refund be reopened and reconsidered and the Commissioner took no action in reference to them after his first rejection in 1928. The record shows that, far from a recommendation to the Commissioner for a reopening and reconsideration, the Special Advisory Committee simply returned the papers to the files of the Bureau with a notation that they were barred by lapse of time. * * *"

The vital difference between that case and the case at bar is that in the *Boyce* case the court was considering the authority vested in the Special Advisory Committee whereas the question here concerns the authority of the Committee on Appeals and Review—an entirely different agency. In the *Boyce* case the court took care to emphasize the limited authority vested in the Special Advisory Committee and pointed out that it was vested with no general authority. At page 279 the court said:

> "The facts of this case are stipulated and show that the Special Advisory Committee was created for the purpose of assisting the Commissioner in disposing of the cases pending before the Board of Tax Appeals and the Commissioner could delegate to the Special Advisory Committee *special authority* in connection with *special cases.* Under its general powers, the matter of handling the deficiency which was then pending before the Board of Tax Appeals was included, and the stipulated facts show that the Commissioner referred this matter to the Special Advisory Committee. The facts do not show that the claims for refund which had been rejected by the Commissioner were referred by him to the Special Advisory Committee, and there is no *general* power delegated to the Special Advisory Committee which gives it the right to consider refund claims which have not been so specifically sent to it by the Commissioner. Doubtless, the Commissioner could have referred these claims to the Special Advisory Committee while it was considering the case before the Board, but the record does not show that he did so. * * * " (Italics supplied.)

In A. R. M. 219, C. B. III-1, p. 319 (appendix), the procedure for appealing to the Committee on Appeals and Review is outlined and the Committee's authority for hearing appeals is stated in part as follows:

> "While only the issues stated in the transmittal letter are before the Committee formally, the Committee is not precluded from calling to the attention of the Unit and of the Commissioner any errors which in its opinion may have been committed by the Unit in adjustments not made the subject of appeal."

It cannot be denied that the main issue considered by the Committee on Appeals and Review, which affected alike all the years including the year 1917, was the taxpayer's right to a deduction for depreciation of its patent license agreements. Certainly, the Committee on Appeals and Review had the right to determine that issue; in fact until that issue was settled the Commissioner of Internal Revenue could not legally make a determination of the true tax liability—that he advised the taxpayer he would make only after a thorough consideration of all the facts as an inducement to obtaining a waiver. Whatever determination the Committee on Appeals and Review made with respect to this question was, of course, controlling upon all the lesser units of the Bureau of Internal Revenue.

This is not a case where the Committee merely made computations of the tax for prior years in order to determine the correct tax for the year formally referred to it as in the *Boyce* case. Here the Committee heard the prior years' case on the merits at the same time that it heard the case for the year 1918. This was after the Commissioner had invited the appellee to be heard further on the 1917 case. Following the hearing the Com-

missioner advised the appellee by letter dated May 22, 1930, that its claim for refund for 1917 would be rejected, not because the claim was untimely but because the Commissioner did not acquiesce in the Board's decision for other years [R. 101]. This shows that he considered the claim on its merits and distinguishes this case from *B. Altman & Co. v. United States,* 40 Fed. (2d) 781 (Ct. Cl.), as well as the *Boyce* case, both of which were cited by the appellant. The claim was formally rejected on July 25, 1930 [R. 164] and it was not until November 3, 1930, that the Commissioner ever indicated that in his opinion the claims were barred by the statute of limitations. These facts undeniably show that the claim was reopened by authorization of the Commissioner.

The Trumble Refining Company not being satisfied with the determination made by the Committee on Appeals and Review of only approximately $160,000.00 value for its patent license agreements appealed to the United States Board of Tax Appeals.

On November 19, 1928, the Board of Tax Appeals found that the March 1, 1913 value of the appellee's patent license agreements was $850,000.00 and that it was entitled to an annual deduction from income amounting to $72,511.90 on account of depreciation and exhaustion of the value of said agreements [R. 287]. On April 25, 1929, the appellee filed with the Commissioner its revised claim for refund in the sum of $17,764.08 for taxes plus interest thereon paid for the year 1917 [R. 155]. The amount of that claim was computed in conformity with

the decision of the Board of Tax Appeals. In a letter dated May 22, 1930, the Commissioner notified the appellee that he had allowed an annual deduction in the amount of $72,711.80 for the years 1920, 1922 and 1923, but that since he did not acquiesce in the Board's decision the claims for 1913, 1914, 1915, 1916, 1917 and 1919 would not be allowed In that letter he added that the claims for 1913, 1914, 1915, 1916 and 1919 were barred by the statute of limitations, but nowhere therein did he take the position that the 1917 claim was barred by the statute of limitations [R. 161]. The formal letter rejecting the above claims was dated July 25, 1930 [R. 164]. In a letter dated November 3, 1930, the Commissioner for the first time stated in his negotiations with the appellee that the claim for 1917 taxes was barred by the statute of limitations [R. 314].

Whether there was a reconsideration by the Commissioner is a conclusion to be drawn from the acts of the Commissioner. *Jones v. United States* (Ct. Cl.), 5 Fed. Supp. 146; *J. E. Irvine & Co. v. United States* (Ct. Cl.), 3 Fed. Supp. 334. The issue is one of fact, and because of that this case must necessarily be decided upon its own peculiar facts; however, the facts involved in *American Safety Razor Co. v. United States* (Ct. Cl.), 6 Fed. Supp. 293, are similar enough to the facts of this case that reference thereto is convincing to show that the evidence in this case is legally sufficient to support the District Court's conclusion that the Commissioner did reopen the 1917 case.

The evidence in *American Safety Razor Co. v. United States,* 6 Fed. Supp. 293, relied upon by the lower court, was as follows: There the plaintiff overpaid its taxes for 1923 because it failed to amortize exhaustion of its patents. It filed a timely claim for refund which was rejected by the Commissioner on May 7, 1928, more than two years before the date on which the plaintiff commenced its suit in the Court of Claims. The plaintiff there filed claims for refund of taxes allegedly overpaid for the same reason for the years 1924 to 1926, inclusive. These were likewise rejected. The plaintiff then appealed to the Board of Tax Appeals on deficiencies for the years 1921 and 1922. In a letter dated December 17, 1927, the Commissioner considered all issues raised by the taxpayer including that raised in the 1923 case. The plaintiff then filed claims for 1923 to 1926 on January 12, 1928. All of these claims were similar and each was for depreciation of patents. On December 17, 1927, the Commissioner rejected the claims for 1923 to 1925, inclusive, and on May 26, 1928, he rejected the claim for 1926. The plaintiff then called the Commissioner's attention to a settlement reached by the parties with respect to 1919 taxes concerning the same issue, and requested "that no action be taken on any of the claims until an opportunity for a hearing thereon has been afforded." In reply the Commissioner stated that the case for 1921 and 1922 then pending before the Board would constitute one settlement, and that the other claims would be "made the subject of a separate communication." Pursuant to stipulation the Board ordered the Commissioner to allow the plaintiff a deduc-

tion for amortization of its patents, this was on September 11, 1929. Thereupon adjustment was made for the years 1920 to 1922, inclusive. In a letter dated December 11, 1930, the Commissioner admitted that the plaintiff had overpaid its taxes for the years 1923 to 1926, inclusive, but refused a refund thereof because the plaintiff's application for reopening was not filed within two years of the date when the first claims were rejected. Thereupon the plaintiff brought an action in the Court of Claims for the recovery of said overpayments. The defense was made in that action that the suit was not a timely one and that the Commissioner had never reopened the claims sued upon. The Court held that the evidence showed that the Commissioner had reopened the claims and it gave judgment for the plaintiff.

Another very recent case which supports the lower court's decision in this case is the case of *Borg-Warner v. U. S.,* decided February 7, 1939, and not yet officially reported but found at Par. 5.230, Volume I of the 1939 Prentice-Hall Tax Service. In that case the court decided against the Government and allowed a recovery of admitted overpayments of taxes for the years 1921 and 1922. In that case, as in the case at bar, the issue involved the depreciation of patents and the taxpayer's case before the Board of Tax Appeals involving the years 1920, 1923 and 1924, was decided in its favor in 1931. The taxpayer's original refund claims for 1921 and 1922 were rejected in 1927. In 1929 further claims for those years were filed. The Commissioner wrote the taxpayer in 1932 that they were being considered, but stated in a

letter written in 1934 that the period for bringing suit had expired.

In that case the court reasoned that it was not necessary for the taxpayer to institute an action contesting the Commissioner's rejection of a claim which had for its basis the same issue as that involved in a proceeding before the Board of Tax Appeals concerning another taxable period. The court stated that it did not believe that Congress intended to compel a taxpayer to bring a multiplicity of suits involving the identical question in order to test his tax liability where one suit could decide the fundamental question involved in all the disputes, and that the Commissioner's rejection of the claims before the decision of the Board might well be regarded as premature.

The appellee respectfully submits that the District Court's findings with respect to the claim for 1917 in the amount of $11,870.88 is sustained by the evidence and that the same was not finally rejected by the Commissioner until July 25, 1930. The appellee had every reason to believe that said claim was being considered by the Commissioner until that date. As stated by the court in *McKesson & Robbins v. Edwards* (C. C. A. 2d), 57 Fed. (2d) 147, 149:

> "* * * While all taxpayers are charged with notice of the Commissioner's action (United States v. Michel, 282 U. S. 656, 51 S. Ct. 284, 75 L. ed. 598), they are entitled to look to all he does, else they will be misled and trapped * * *."

In view of the foregoing it is respectfully submitted that the findings of fact made by the court to the effect that the claim for refund was reopened and reconsidered and was not finally rejected until July 25, 1930, are amply supported by the record.

II.

The Claim for Refund Filed by the Appellee on June 17, 1920 Was Legally Sufficient to Warrant the Refund of $7,860.19 Tax Paid by It on May 22, 1923.

The appellee's original claim for refund of 1917 taxes was filed on June 17, 1920 [R. 45]. Reference to that claim shows that it demanded a refund of taxes on the ground that it was rightfully entitled to a deduction (which it had failed to take) for exhaustion of its patent license agreements [R. 15]. At the same time that it filed that claim it filed a claim for abatement for an assessment of a deficiency for the year 1917 in the amount of $6,365.00 and also an amended return [R. 101]. Said deficiency was the result of a computation made by the Commissioner under Section 210 of the Revenue Act of 1917. The appellee's return for that year had been prepared and the computation of tax made under Section 209.

The appellant argues that since the deficiency assessed had not yet been paid at the time that the claim for refund was filed it could not operate as a claim for refund of an amount later paid in satisfaction of the deficiency. In support of that proposition it cites *Riverside Hospital v. Larson* (S. D. Fla.), 384 C. C. H. 9542. That was a hearing on demurrer and the court filed no written opinion in support of its decision. There the Commissioner assessed a deficiency against the plaintiff in the amount of $5300.00 of which $1500.00 had been paid at the time that the plaintiff brought suit. The complaint alleged, and for the purposes of the hearing on demurrer it was admitted, that the total correct tax liability was $1,216.44, so that to the extent of $244.18 the plaintiff had over-

paid its taxes, in spite of the fact that more than $3,000.00 of the deficiency assessed still remained unpaid. The court held that until payment of the entire tax had been made, including the deficiency, no action for the recovery thereof could be maintained. The ground stated for the decision was that there was no authority for allowing a taxpayer to contest an assessment in advance of payment.

Obviously that case is not in point here because in this case the entire tax liability, including the deficiency assessment was paid prior to the time that this action was brought. The reason for denying the plaintiff relief in the Riverside Hospital case was not that the claim had been filed in advance of payment, as the appellant contends, but that a suit was instituted prior to the payment of the tax. Thus, that case does not sustain the appellant's contention.

Aside from the fact that the case cited by the appellant is distinguishable on its facts from the case at bar still the appellee respectfully submits that that decision is clearly wrong. Section 250 (d) (3) of the Revenue Act of 1921 gave this taxpayer the right to contest the assessment of the tax in advance of payment. That section provides that if the Commissioner determines a deficiency of tax under the Revenue Act of 1917 he shall issue a "thirty-day letter" from which the taxpayer may appeal before paying the tax. In addition to that remedy the taxpayer was given another remedy by Section 284 of the Revenue Act of 1926 which provides that where an overpayment of taxes imposed by the 1917 Act is made, the same shall be refunded on the application of the taxpayer. Furthermore, those remedies are not alternatives for the taxpayer may protest the assessment of a deficiency and after paying it may file a claim for refund therefor.

Since the remedies are not alternatives, and since the taxpayer is entitled to pursue both of them, there is no reason for denying him the right to pursue both concurrently unless the denial is expressed in the statute. The appellant argues that it is. Its argument rests upon the decision of the Court of Claims in *Hills v. United States,* 50 Fed. (2d) 302. The appellant says that the foregoing case held that the words "after the payment of such tax" found in Section 3228 of the Revised Statutes mean after the payment of "all" the tax, and that Section 284 (b) (1) (2) means that a claim cannot be filed until payment of all the tax has been made. It is true that in that case the court stated the premise of the appellant's argument but it neither stated nor held that the conclusion drawn by the appellant follows from the premise. The reason that the court gave for saying that "after the payment of such tax" meant after the payment of "all" the tax was that in so doing it thereby fixed a point in time from which an ensuing period could be computed. The holding in that case was only that the statute runs from the date when the last payment of the tax is made, and that the taxpayer is not limited to a recovery of only so much tax as it paid within the four years immediately preceding the date when the claim for refund was filed. Of necessity, the last payment of the tax is made when "all" of the tax is paid. Thus it appears that while the statement made by the court there was proper when read in the light and context of the rest of its opinion yet when it is stated without reference to the facts of that case it is misleading.

Furthermore, Section 3228 of the Revised Statutes does not apply to income and excess profits taxes, *Hills v. United States,* 8 Fed. Supp. 849, 853, and its wording

and construction differ radically from the wording of Section 284 (b) (1) (2) of the Revenue Act of 1926 which is admittedly applicable to the facts of this case. It must be obvious that Section 284 (b) (1) is a statute of limitations intended to set an *outside limit* on the time within which a claim may be filed. As stated by the Supreme Court with reference to this statute in *United States v. Memphis Cotton Oil Company,* 288 U. S. 62, 71, 77 Law Ed. 619, 624, "The function of the statute, like that of limitations generally, is to give protection against stale demands." The reason for enacting a statute of limitations is to encourage promptness in the bringing of actions, *Missouri K. & T. R. Co. v. Harriman Bros.,* 227 U. S. 657, 57 Law Ed. 690. See also *Shipp v. Miller,* 2 Wheat. 316, 4 Law Ed. 248. Such statutes are founded upon the theory that claims which are valid are not allowed to remain unenforced, *Weber v. State Harbor Commissioner,* 18 Wall. 57, 21 Law Ed. 798. In such statutes one does not find limitations on the time before which an action can be brought. The policy which outlaws stale claims does not call for a rule defining premature claims. The plain, obvious and natural meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and careful study of an acute and powerful intellect would discover. *Lynch v. Alworth-Stephens Co.,* 294 Fed. 190, 194. It therefore appears that since the object of the statute was to define stale claims rather than to define premature ones that the appellee's claim was timely and was not premature.

The amount demanded in the claim for refund filed on June 17, 1920 was "$9,749.80 (OR SUCH GREATER AMOUNT AS IS LEGALLY REFUNDABLE)" [Exhibit F, R. 139]. At the time this claim for refund was filed the taxpayer had paid only $11,870.68; at this time the Commissioner had assessed, on a superficial audit, $6,365.00. As a part of the claim for refund the Trumble Refining Company filed an amended income tax return and a claim to abate the additional taxes of $6,365.00. The grounds for the amended return, the claim for refund and the claim in abatement were all the same, namely, the right to take a deduction for the exhaustion of the March 1, 1913 value of the taxpayer's patent license agreements. Inasmuch as the Commissioner reopened and reconsidered the claim for refund and did not file a rejection until July 25, 1930 the appellant's action was a timely one.

In another part of this brief the appellee has shown that final action was not taken on this claim until July 25, 1930. On April 25, 1929, the appellee amended its original claim by increasing the amount of its demand so as to include the $7,860.19 paid in satisfaction of the $6,365.00 deficiency assessed February 21, 1920 [R. 27]. The facts and grounds relied upon in its amended claim were the same as those upon which it had predicated its right to a refund in its original claim. The only difference between the original and the amended claim was that the latter now demanded the return of a greater amount than the original claim. In *Bemis Bros. Bag Company v. The United States,* 289 U. S. 28, 35, 77 L. Ed. 1011, 1015, the Supreme Court held that the taxpayer could amend a

timely claim after the period for filing claims had expired but before final action by the Commissioner where the amended claim differed from the original only in requesting different relief. There the court gave as a reason for holding that the amendment was timely that "In amending the claim by a prayer for alternative relief, a taxpayer is not forcing the inquiry into an unexplored territory, onto strange and foreign paths. He is asking the Commissioner to take action upon discoveries already in the making or perhaps already made."

In *United States v. Andrews,* 302 U. S. 517, 524, 82 L. Ed. 398, 403, the court stated that "an amendment which merely makes more definite the matters already within his (the Commissioner's) knowledge, or which, in the course of his investigation, he would naturally have ascertained, is permissible." In the case at bar the original claim for refund stated all the facts which would entitle the appellee to a refund of the $7,860.19. If the appellee was entitled to a deduction for exhaustion of the March 1, 1913 value of its patent agreements its taxable net income for the year 1917 would automatically be reduced from $89,469.54 to $16,957.64 and would thus dispense with any question concerning a special assessment. The two questions were relative and dependent. The facts upon which both questions rested were stated in the original claim, and of necessity, the Commissioner had to consider both in order to resolve either one alone. Therefore the appellee respectfully submits that the amendment was permissible within the rule stated in the foregoing cases and that the action brought was timely.

III.

The Tax Liability in Question Is Subject to Review.

A. No Final Determination Was Made That the Appellee's Tax Liability Should Be Computed Under Section 210 of the Revenue Act of 1917.

In *Welch v. Obispo Oil Company,* 301 U. S. 190, 196, 81 L. Ed. 1033, 1036, the Supreme Court considered a special assessment made under Section 328 of the Revenue Act of 1918. There the court stated that "the taxpayer's true net income is an essential factor in the determination of his liability under Sections 327 and 328." In *Heiner v. Diamond Alkali Company,* 288 U. S. 502, 77 L. Ed. 921, principally relied upon by the appellant, the court said that the Commissioner cannot make a final administrative determination under the special assessment provisions until he has determined the net income of the taxpayer. In the case at bar the Commissioner never did finally determine the factor (net income) essential to the determination of the rate of tax applicable under the provisions of Section 210 of the Revenue Act of 1917.

Subsequent events show that the Commissioner never regarded his letter of February 21, 1920 [R. 98] proposing a tax computed under Section 210 as a final determination. The amended income tax return [R. 107], the claim for refund [R. 138], and the claim in abatement [R. 143] were all filed in June of 1920. Each of these instruments protested the Commissioner's disallowance of a deduction for depreciation. Thereafter the Commissioner sent one of his agents to examine the appellee's books for the years 1917 to 1920 inclusive [R. 142], and he later accepted and considered the appellee's brief of February 1, 1922 wherein the demand for a depreciation deduction was repeated [R. 167].

In December of 1922 he agreed that he would hold in abeyance the consideration and final determination of the appellee's tax liability for 1917 until the liability for subsequent years could be reviewed and determined [R. 247]. Pursuant to that understanding and at the Commissioner's request, the appellee filed an unlimited waiver of the statute of limitations for 1917 on February 1, 1923. On February 5, 1923 the Bureau sent its letter disclosing a tax computed under Section 210 based upon a net income of $88,727.83 rather than $89,469.54 upon which the first assessment had been made. At this time he was still considering the issue of depreciation. It is inconceivable that in those four days the Commissioner fully considered the matter anew and made a final determination. Especially is this so in view of the fact that he had assured the appellee that he would further consider the 1917 case together with the other years at a later date. When he requested the waiver for 1917 he still had adequate time (until April 20, 1923) within which he could make an assessment. His request for a waiver and his agreement to consider all the years together certainly negatives the idea that the routine letter of February 5, 1923 was a final determination, furthermore the trial court so held.

When the appellee received the letter of February 5, 1923 it reminded the Commissioner of his agreement of December, 1922 to hold the 1917 case in abeyance [R. 153], and the Commissioner acknowledged by inviting further consideration of the 1917 case [R. 154]. After exhaustive preparation the appellee then filed a brief and protest in which it further argued its right to a deduction for depreciation [R. 167]. Thereafter a conference was held in Washington for the specific purpose of determining the March 1, 1913 value of the appellee's patent license agreements. That was the sole issue in the controversy

for all of those years, and the determination of that issue would fix the appellee's net income which the Supreme Court said was an essential condition precedent to the Commissioner's final determination of a special assessment.

After considering the data presented to him the Commissioner himself determined that the appellee's patent license agreements had a March 1, 1913 value which it was entitled to amortize over the remaining life of the patents [R. 320]. Certainly his action in this regard is inconsistent with the appellant's contention that he intended to make a final determination in his letter of February 5, 1923 or the following letter of February 21, 1923. From the foregoing it is readily apparent that the Commissioner never did make a final determination of the appellee's net income, yet even under the authorities cited by the appellant it must be conceded that a determination thereof is a necessary condition precedent to his final administrative action under Section 210. The appellee never did accept the Commissioner's proposal to make a special assessment, and at no time from June, 1920 until this suit was instituted did the Commissioner indicate that he considered his determination under that section to be final. The technical defense now raised by the appellee appears to have occurred as an afterthought.

The foregoing discussion has assumed that the Commissioner was authorized to make a special assessment. While that may have been true under Section 328 of the Revenue Act of 1918, such was not the case under Section 210 (1) of the Revenue Act of 1917, for in the latter section the statute specifically provided that the application thereof depended upon the inability of the Secretary of the Treasury to determine the taxpayer's

invested capital. It does not appear from the record in this case that the Secretary of the Treasury ever acted in any particular with respect to this case. The appellee never received any notice from him stating that he was unable to determine its invested capital. Neither did the taxpayer receive from him any statement to the effect that the Commissioner of Internal Revenue had been authorized by him to make a special assessment. It therefore appears that the Commissioner not only forced a special assessment upon the appellee without any request made therefor, but that in making the assessment which he did the Commissioner was acting beyond the scope of his authority.

B. Even Assuming That the Commissioner Did Make a Final Determination Under Section 210 of the Revenue Act of 1917 Still the Appellee's Tax Liability for That Year Is Subject to Review Because It Did Not Request a Special Assessment.

The trial court found that the Trumble Refining Company at no time requested or acquiesced in a determination of its excess profits taxes for the year 1917 pursuant to the provisions of Section 210 of the Revenue Act of 1917 and that it at all times protested the determination of its taxes under that section [R. 55]. In *McKeever v. Eaton,* 6 Fed. Supp. 697, the court found that the Commissioner forced a special assessment on the plaintiff for 1918 without its request. The contested issue in that case as in the case at bar was the plaintiff's right to amortization of patent depreciation. There the defendant contended that the tax having been assessed under Sec. 328 of the Revenue Act of 1918 was not reviewable. In that case the court distinguished the cases of

Heiner v. Diamond Alkali Co., 288 U. S. 502, 77 L. ed. 921; *United States v. Henry Prentiss & Co.,* 288 U. S. 73, 77 L. ed. 626; *Williamsport Wire Rope Company v. U. S.,* 277 U. S. 551, 72 L. ed. 985 and *Bemis Bro. Bag Co. v. United States,* 289 U. S. 28, 77 L. ed. 1011. The court in the *McKeever* case, *supra,* stated (702):

> "It thus appears that none of the three cases embody the situation presented in the case at bar. This case is distinguishable from the Diamond Alkali case by the fact that there the taxpayer completely ignores the special assessment, seems never to have in any sense accepted the same, and is not asking this court to apply the rate of tax determined upon by the Commissioner in his special assessment to a base different from that found by him. On the other hand, it is also distinguishable from the Bemis case by the fact that in the Bemis case the special assessment was refused, whereas in the case at bar the special assessment was actually made. However, I find from the entire record the following:
>
> "1. That the Commissioner was adequately apprised, prior to the making of his special assessment, of the various grounds upon which error was claimed in his computation of the tax.
>
> "2. That, while it is true that the prayer for a special assessment was granted and the tax computed accordingly, the taxpayer did not in fact acquiesce in the decision arrived at by the Commissioner, but, on the contrary, consistently kept on claiming errors in the computation of the tax, based upon errors of fact and law.
>
> "3. That the Commissioner never took the position that his special assessment concluded the matter but, on the contrary, kept the case open and kept on re-

examining the situation upon the merits for several years after the special assessment had been made. By the merits in this connection I mean not the merits with relation to special assessment, but the merits of the claims of errors in fact and in law in his computation of the tax.

"Upon this record I therefore reach the conclusion that the making of the special assessment does not constitute a bar to the prosecution of this suit."

In *American Chemical Paint Co. v. McCaughn,* 24 Fed. Supp. 258, the plaintiff brought an action to recover 1919 excess profits taxes. The contested issue in that case was the plaintiff's right to amortize patent depreciation. There as in this case the Commissioner and the plaintiff continued negotiations over a period of years attempting to settle the issue. In the meantime the plaintiff brought an action for the recovery of 1927 income taxes and the court held that it was entitled to an annual depreciation deduction. Thereupon the plaintiff brought suit for its 1919 taxes and on the first hearing the court held for the defendant on the ground that the plaintiff had requested a special assessment under Section 328 of the 1918 Act and that the Commissioner's determination foreclosed judicial review. In support of its decision it cited *Heiner v. Diamond Alkali Company, supra.* On rehearing it vacated its finding that the plaintiff requested a special assessment and thereupon entered judgment for the plaintiff. Thus it appears that in that case the court had before it the very issue involved in this case and after careful consideration of the very distinction for which the appellee contends it concluded that the

decisions which hold that the Commissioner's determination may not be reviewed by a court are not applicable. It should be noted that the Commissioner did not appeal from the judgment in that case. Vol. I, 1938 P-H, Par. 4.17.

The appellant argues that the purpose of Sec. 328 of the Revenue Act of 1918 is the same as that embodied in Sec. 210 of the Revenue Act of 1917. To that extent we agree, namely, that the purpose of the two sections is the same. Congress intended to give the taxpayer a choice of remedies. As stated by the Supreme Court in *Welch v. Obispo Oil Company,* 301 U. S. 190, 191, 81 L. ed. 1033, 1034, the object of enacting the special assessment sections of the Revenue Acts of 1917 and 1918 was to relieve the taxpayer in cases where the profits taxes might prove unduly burdensome. Therefore, it provided that the taxpayer might have either one of two assessments, it could accept the assessment normally made under the statute and if dissatisfied therewith could then appeal for judicial review. On the other hand, if it requested a special assessment under the relief provision it thereby waived its right to a judicial review of the Commissioner's determination. Congress did not intend that the Commissioner should be allowed to force this relief provision upon the taxpayer so that he could thereby impose a greater tax. Where taxpayers have appealed to the Board of Tax Appeals from the Commissioner's determination under the special assessment provisions the Board has consistently held that the Commissioner could

not apply these sections to increase the tax. *Sumpter Valley Railway Company,* 10 B. T. A. 1325, *Frederick A. Tschiffely,* 5 B. T. A. 1242, *Brownsville and Matamaris Bridge Co.,* 1 B. T. A. 320. If Congress did not intend to allow the Commissioner to use these provisions of the Act so that he could increase the taxpayer's liability it certainly did not intend to allow him to foreclose judicial review after having increased the tax by application thereof.

The appellant cites *Con P. Curran Printing Company v. U. S.,* 14 Fed. Supp. 638, a case decided by the Court of Claims wherein that court referred to *McKeever v. Eaton, supra,* and refused to follow its ruling. The appellee respectfully submits that the decision in *McKeever v. Eaton* speaks for itself and furthermore wishes to point out that in *U. S. v. Andrews,* 302 U. S. 517, 527, 82 L. ed. 398, 404, a case appealed from the Court of Claims, the Supreme Court expressly stated that the decision in the *Con P. Curran* case was in conflict with the decisions of the Supreme Court.

The appellant also cites *Welsh v. St. Helen's Petroleum Co.,* 78 F. (2d) 631, for the proposition that this court there rejected the taxpayer's contention that the Commissioner's action in order to be reviewable must be predicated upon a request for a special assessment. However, in that case the taxpayer was a foreign corporation and under Section 327 (b) of the Revenue Act of 1918 it was mandatory that the Commissioner make a special assessment of its taxes. There only one method of assess-

ment was open to the taxpayer which is not the case with respect to a domestic corporation. As stated in *Frederick Warne and Co. v. U. S.*, 62 Ct. Claims, 363, 369, with respect to Section 328 of the Revenue Act of 1918:

> "The statute is in positive terms, and expressly points out its applicability to foreign corporations. Why a discrimination between foreign and domestic corporations was deemed advisable is not for judicial determination. The act used mandatory terms and mentions foreign corporations as not entitled to the exemption provided in section 302."

Whatever the rule may be where the Commissioner's special assessment is the only remedy and is made mandatory by the statute, it is nevertheless clear that where his special assessment is only permissive, and merely constitutes an alternative relief provision for the benefit of the taxpayer, that in such cases he can not arbitrarily impose a special assessment on the taxpayer without the latter's request and thereby precluded a judicial review of his determination.

C. The Special Assessment Proposed by the Commissioner Was Arbitrary.

The trial court found that the Commissioner's action in refusing to allow Trumble Refining Company a deduction of $72,511.90 from its gross income for 1917 in accordance with the decision of the Board of Tax Appeals and in refusing to allow the refund due as a result of such allowance was arbitrary [R. 53-54]. The evidence

adequately supports this finding. The parties stipulated that the appellee's invested capital for 1917 was $67,760.17 as computed under Section 207 of the Revenue Act of 1917 [R. 165]. The appellee's tax liability for 1917 based upon an invested capital of that amount was $3,389.19 [R. 56]; yet the Commissioner acting under a "relief provision" computed the appellee's taxes for that year at $19,730.87.

The taxable net income reported by the appellee was $89,469.54 [R. 43], but the Board of Tax Appeals held that the depreciation deduction to which it was entitled amounted to $72,511.90 [R. 52], so that its correct taxable net income in fact amounted to only $16,957.64. The Board's decision holding that the appellee was entitled to an annual deduction for depreciation was *res adjudicata* and binding upon the Commissioner with respect to all years affected by the decision of that issue, including the year 1917. *Erb et al., Exrs. v. U. S.,* 384 C. C. H. 9589. Yet in spite of that fact it appears that the Commissioner collected $19,730.87—a *tax* actually exceeding the taxpayer's *net taxable income* by $2,773.23. The appellee respectfully submits that better evidence of capricious and arbitrary action could not be imagined. When a tax upon net income exceeds the net income it ceases to be a tax and necessarily amounts to confiscation.

Although the appellee earnestly contends that in granting its prayer for relief the trial court did not review any authorized discretionary act of the Commissioner, yet if this court should be of a contrary opinion then it is

respectfully submitted that the Commissioner's determination is reviewable because it was arbitrary. The rule is well settled that a finding made by an administrative officer within the scope of his authority is not subject to judicial review. On the other hand, where he has acted beyond the scope of his authority, or where his action has been arbitrary, the party aggrieved is entitled to a judicial review of his determination. See *Williamsport Wire Rope Co. v. United States,* 277 U. S. 551, 562, 72 L. ed. 985, 988; *Lucas v. American Code Co.,* 280 U. S. 445, 449, 74 L. ed. 538, 540; *Lucas v. Kansas City Structural Steel Co.,* 281 U. S. 264, 271, 73 L. ed. 848, 852; *Dismuke v. United States,* 297 U. S. 166, 172, 80 L. ed. 561, 566.

Whatever view may be taken of this matter the evidence clearly shows that the action of the Commissioner in making the assessment under Section 210 was arbitrary, erroneous and illegal.

THE STIPULATED INVESTED CAPITAL CLEARLY REFUTES THE STATEMENTS MADE IN THE COMMISSIONER'S LETTERS OF FEBRURY 21, 1920 AND FEBRUARY 5, 1923 TO THE EFFECT THAT THE TAXPAYER'S INVESTED CAPITAL COULD NOT BE DETERMINED. IN ANY EVENT THE STIPULATED INVESTED CAPITAL CONCLUSIVELY DEMONSTRATES THAT THE ILL-CONSIDERED ASSESSMENT UNDER SECTION 210 WAS ARBITRARY AND VOID.

The court found that the correct taxable net income of the taxpayer for the year 1917 was $16,957.64. The tax computed by the Commissioner under the relief provi-

sions amounted to $19,730.87,—$2,773.23 in excess of the net taxable income. The tax which the appellant now tries to hold from the appellee is confiscatory; it is in excess of the net income. Certainly Congress never intended under the relief provisions for the Commissioner to collect and withhold a tax in excess of the net income. The technical and unconscionable defenses now urged against the recovery of the tax shock the sense of justice. Hypercritical and technical defenses should not be sustained. Justice and fair dealing compels a repudiation of such hypertechnical defenses.

After the assessment was made the Commissioner voluntarily determined that the taxpayer was entitled to an annual deduction for the exhaustion of the March 1, 1913 value of its patent license agreements. This determination of itself is sufficient to show that the Commissioner's assessment under Section 210 was without legal or equitable justification.

In view of the foregoing it is respectfully submitted that the decision of the lower court should be sustained.

Respectfully submitted,

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APPENDIX.

ARTICLE 1006: Appeals and hearings. A. R. M. 219. III-4-1331.

RULES OF PROCEDURE BEFORE COMMITTEE ON APPEALS AND REVIEW.

1. The jurisdiction of the Committee on Appeals and Review is limited to cases under section 250(d) of the Revenue Act of 1921 wherein appeals have been perfected pursuant to the procedure specified in article 1006 of Regulations 62, as amended by T. D. 3492 (C. B. II-1, 170), and to such other cases as may specifically be referred to it by the Commissioner of Internal Revenue.

2. When an appeal has been duly perfected and the case forwarded to and received by the Committee, together with a certification by the Income Tax Unit of the issues on appeal, a copy of such certification having previously been mailed to the taxpayer, the taxpayer or his duly authorized representative will be notified of the date and hour set for a hearing of the appeal. A hearing or an opportunity for a hearing before a member is a hearing or an opportunity for a hearing before the Committee.

3. The representative of the taxpayer should be prepared to exhibit at the hearing (1) a copy of his power of attorney, (2) evidence of his enrollment to practice before the Department, and (3) evidence of having filed, as required by departmental regulations, the declaration concerning contingent fees.

4. The statute merely provides that an opportunity for hearing shall be granted. Unless an appearance is made at the time set for hearing, or for adequate cause shown a postponement requested in writing and granted,

the opportunity for hearing will be considered as waived, and the case will thereupon be decided on the record.

5. All evidence submitted by the appellant must be in affidavit form and an outline of the argument showing the authorities relied upon should be in documentary form. If briefs in addition to those filed with the Income Tax Unit are to be submitted to the Committee, they must be filed with the Committee in triplicate at least three days prior to the date set for hearing. Oral evidence may be presented, but such oral evidence can only be confirmatory of the evidence of record. The oral discussion at the hearing will be merely to elucidate the issues or dispose of any misunderstanding with respect to the evidence or argument.

6. The hearing before the Committee can not be made the occasion for the presentation of new evidence. In the event that the hearing develops the desirability of new evidence, it may be admitted or rejected at the discretion of the Committee. If the evidence is admitted, the Committee may in its discretion, resubmit the case to the Income Tax Unit for a further expression of its views upon the issue or issues involved.

7. While only the issues stated in the transmittal letter are before the Committee formally, the Committee is not precluded from calling to the attention of the Unit and of the Commissioner any errors which in its opinion may have been committed by the Unit in adjustments not made the subject of appeal.

8. The hearing or opportunity for hearing before the Committee is the final hearing or opportunity for hearing in the Bureau of Internal Revenue. When a case has been heard or the opportunity for hearing waived and the recommendation of the Committee has been approved by

the Commissioner of Internal Revenue, the decision arrived at and communicated to the taxpayer or his representative is the final decision of the Bureau of Internal Revenue in so far as the issues considered in the recommendation are concerned, and such issues will not again be considered by the Bureau except as provided by T. D. 3492.

9. The procedure herein outlined applies to the Special Committee on Appeals.

Office Decision 709 (C. D. 3, 370) is revoked.

CHARLES D. HAMEL,
Chairman Committee on Appeals and Review.

STATUTES.

SEC. 1113 (a). Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment

of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail." (U. S. C., Title 26, Sec. 1672.)

Revenue Act of 1926.

CREDITS AND REFUNDS.

Sec. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section,—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer;

No. 9049

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTH SIDE CANAL COMPANY, LIMITED, a corporation,

Appellant,

vs.

IDAHO FARMS COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

FILED

JAN 31 1939

PAUL P. O'BRIEN, CLERK

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9049

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PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

WAYNE A. BARCLAY,
Jerome, Idaho,
J. H. BLANDFORD,
FRANK L. STEPHAN,
Twin Falls, Idaho,
RICHARDS & HAGA,
Boise, Idaho,
Attorneys for Appellant.

EDWIN SNOW,
Boise, Idaho,
A. F. JAMES,
Gooding, Idaho,
Attorneys for Appellee.

In the District Court of the United States for the District of Idaho, Southern Division

No. 1997

IDAHO FARMS COMPANY,
a corporation,

Plaintiff.

vs.

NORTH SIDE CANAL COMPANY, LIMITED,
a corporation,

Defendant.

COMPLAINT

Plaintiff complains against defendant and alleges:

I.

That it is a corporation, organized and existing under and by virtue of the laws of the State of Delaware, and is a citizen and resident of said state, and that it has fully complied with all the provisions of the statutes and constitution of the State of Idaho authorizing it to transact business in Idaho.

II.

That the defendant is a corporation, organized and existing under and by virtue of the laws of the State of Idaho and is a citizen and resident of said state.

III.

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

IV.

That many years ago this plaintiff, then known as Twin Falls North Side Land & Water Company, a corporation duly organized and existing under the laws of Delaware, and then and ever since duly qualified and authorized to do business in Idaho (being hereinafter referred to as the construc- [4*] tion company), entered into three certain contracts in writing with the State of Idaho, said contracts being dated, respectively, April 15, 1907, August 21, 1907, and January 2, 1909, under the provisions of an Act of Congress of August 18, 1894, and acts amendatory and supplemental thereof, commonly known as the "Carey Act", and the laws of Idaho applicable to said Carey Act, and accepting the benefits thereof, whereby said construction company agreed to construct certain irrigation works for the irrigation of about 200,000 acres of land in the then counties of Lincoln and Elmore, State of Idaho (now Jerome, Gooding, and Elmore Counties), said land having been theretofore segregated to the State of Idaho under said Carey Act; and moreover agreed to sell to settlers upon said lands water rights or shares in said irrigation system so to be constructed; that said contracts are sometimes hereinafter referred to as the "state contracts"; that said contracts were by their terms to be construed together with, and each related to, the same irrigation enterprise, and except as to the description of the lands to be reclaimed

*Page numbering appearing at the foot of page of original certified Transcript of Record.

thereunder and other minor matters were substantially identical in form and substance.

V.

That the plan and method of procedure for the construction of said irrigation system and for selling water rights therein, and for operating the same after completion, which was provided for in the said state contracts, and which has been followed on said irrigation project is and was as follows: [5]

That a corporation should be and was formed known as the North Side Canal Company, Limited (which is the defendant, and is hereinafter for brevity called the canal company), with a capital stock of 200,000 shares, each share of which was intended to be irrigated from said system; that initially the entire capital stock of said canal company should be and was delivered to the construction company in consideration of the building by it of said irrigation works and system, but which stock was delivered to it for sale to settlers or landowners under said irrigation system; that each original purchaser of the water right for a specific tract of land to be reclaimed should and did enter into a water contract with the construction company; that in each of said water contracts the construction company agreed to and did sell to the landowner executing the same one share of the capital stock of said canal company as and for the water right for each acre of land to be irrigated; that it was further provided in said contracts that said irrigation sys-

tem, together with all water appropriations, rights, franchises, and privileges, should after its completion be, and it has been, transferred to said canal company, it being the purpose and intent of said state contracts that said canal company would hold said irrigation system and all water appropriations, rights, franchises, and privileges belonging thereto or appurtenant to the land served thereby, for and on behalf of its stockholders, and that said system with its water appropriations and privileges would after completion be transferred to said canal company to be owned, held, managed, and operated by the latter; that the water rights under said project which has been sold are represented by shares of stock in the said canal company; that each purchaser of water [6] rights purchased and acquired as such water right one share of the capital stock of said canal company for each acre of his land, and there was issued to each purchaser of a water right in said system one share of the stock of said canal company as the water right for each acre of the irrigable land owned by such purchaser or entered by him under the Carey Act; and the said defendant canal company is composed of and represents the owners of water rights or holders of water contracts.

VI.

That pursuant to said state contracts said construction company, between the years 1907 and 1920, constructed and completed said irrigation project for the reclamation of a gross area of approximately

200,000 acres of land lying in said Jerome, Gooding, and Elmore Counties, and contracted with landowners for the sale of approximately 170,000 shares or water rights therein; and upon the completion of said irrigation system, it transferred, pursuant to said state contracts, the ownership management, operation, and control of said irrigation works and system to said defendant canal company; and the latter is now, and for many years past has been, managing, operating, and controlling the same as the owner thereof, but for the benefit of and in the interest of its stockholders who are the owners of water rights in said irrigation system.

VII.

That on or about the 1st day of November, 1907 said construction company, for the purpose of securing funds with which to build and construct the irrigation system and works described in said state contracts, executed to the American Trust & Savings Bank, as trustee, its certain mortgage or deed [7] of trust by which it mortgaged, pledged, and conveyed to said trustee all its interest in the irrigation works, water rights, and other rights and franchises in connection therewith, and the water contracts then, or thereafter, to be entered into, and all moneys due or to become due thereunder, to secure an issue of bonds as in said mortgage or deed of trust provided, in the authorized amount of $5,000,000.00, of which authorized issue bonds in the aggregate principal amount in excess of $3,700,-

000.00 were issued and sold by said construction company to raise funds with which to construct irrigation works, and which said bonds were sold to numerous persons throughout the United States; and to further secure said bonds, and in compliance with said deed of trust, said construction company at various times pledged and assigned to said American Trust & Savings Bank, as trustee for said bondholders, and to its successors in the said trust, all of its interest in the said various individual water purchase contracts from time to time made and entered into with settlers. That thereafter, the Continental & Commercial Trust & Savings Bank, an Illinois corporation, by merger and change of corporate name, succeeded to all the rights, duties, and obligations of said American Trust & Savings Bank, as trustee for said bondholders under said mortgage or deed of trust and likewise succeeded to said assigned contracts deposited in pledge, as aforesaid, with its predecessor trustee. That the contracts for the sale of water rights made by the construction company with the owners of land under said irrigation system and deposited, as aforesaid, with the trustee for the bondholders to secure the payment of the bonds were alike in substance, tenor, and effect, except as to immaterial particulars; that a copy [8] of one such contract is hereto attached, marked "Exhibit A", and made a part hereof; and all other water contracts so entered into and deposited with said trustee were of similar tenor and effect.

That on or about December 1, 1927, said Continental & Commercial Trust & Savings Bank, suc-

cessor trustee for the bondholders, as aforesaid, merged and consolidated with Continental & Commercial National Bank of Chicago, Illinois, under the name of Continental National Savings Bank & Trust Company of Chicago; and by virtue of such merger and consolidation said Continental National Bank & Trust Company of Chicago became, and thereafter continued to be, successor trustee for the bondholders of said bonds under said mortgage or deed of trust, and had with respect to the water purchase contracts deposited as security for said bonds, and with respect to all other matters arising under said mortgage or deed of trust, all duties, rights, powers, and privileges of the original trustee.

VIII.

That in the year 1913, after several million dollars had been expended in the construction of said project, and while the same was uncompleted and unfinished, and before water had been made fully available for the irrigation of all the lands within said project, the construction company became insolvent and failed. Thereupon, the corporations and individuals owning its outstanding bonds appointed a bondholders' protective committee which committee, thereunto duly authorized by said bondholders, thereafter advanced on behalf of said bondholders large additional sums of money used in the subsequent construction and completion of said irrigation works under said state contracts; and said bondholders protective committee, act- [9] ing

in conjunction with said trustee for the bondholders, then took over, for the sole use and benefit of the bondholders, the management and control of the construction company and all of its property and business; and the latter, at all times from and after the year 1913, has been operated and carried by said bondholders, and said construction company has held and owned such property as remained in its name solely for the use and benefit of said bondholders, all of the property remaining in its name being subject to the lien of said mortgage or deed of trust and the bonds thereby secured, which lien always was in an amount far exceeding the combined aggregate value of the property remaining in the name of the construction company plus all other assets pledged with, mortgaged to, or taken over by said bondholders' protective committee and said trustee for the benefit of the said bondholders.

Whenever it is hereinafter stated that any action was taken or thing done by said construction company, subsequent to the year 1913, such action taken or thing done by said construction company, while it may have been done in its name, was done by and at the cost and expense of, and in the interest and for the benefit of said bondholders, acting through their said trustee and said committee.

IX.

That subsequent to the execution of the aforesaid mortgage or deed of trust by the construction company, it deposited with and pledged and assigned to the said trustee, for the holders of the bonds thereby

secured, all contracts entered into by the construction company, as aforesaid, for the sale of water rights or shares in said irrigation system, which said water right contracts, to the extent of the several [10] amounts owing and unpaid thereon, respectively constituted a lien upon the lands and shares of stock in each severally described, all as provided by the laws of the United States, commonly known as the Carey Act, by the laws of the State of Idaho (and particularly the provisions of said laws of Idaho now embodied in Section 41-1726, Idaho Code Annotated, 1932, formerly Section 3019, Idaho Compiled Statutes) and by said state contracts, and each of them; that said trustee from time to time made collections of installments of principal and interest falling due on some of said water contracts until the same were fully paid, and thereupon, in the manner provided in said mortgage or deed of trust, said trustee released from the several liens imposed by such respective water contracts so paid up in full, the lands and water rights severally covered thereby; that upon certain other of said water contracts deposited with said trustee, as aforesaid, payments of the installments of the purchase price, with the interest thereon, have from time to time been made by the purchasers of such contracts, without such default occurring as necessitated their foreclosure, although frequent extensions of time for such payments have been given by said trustee, and a considerable number of such contracts are in full force and effect, with installments, however, still

unpaid thereon but which are being collected, and which last mentioned contracts are now owned and held by this plaintiff.

X.

That upon certain of said water contracts deposited, as aforesaid, with the trustee under said mortgage or deed of trust, it was necessary, upon default being made in the payments of principal and interest falling due under said several [11] contracts, for said trustee (either in its own name or in the name of an agent or agency, as hereinafter more particularly set out) to conduct proceedings for the enforcement and foreclosure of the respective liens imposed thereby; and by reason of such proceedings and in the enforcement and foreclosure of said water contracts, said trustee acquired, in the place and stead of such water contracts originally deposited with it, certain real property situated in Jerome, Gooding, or Elmore County, Idaho, together with the respective shares of stock purchased under the aforesaid water contracts and evidencing a water right for the respective parcels of land intended to be irrigated thereby; that attached hereto as "Exhibit B", and made a part hereof, is a list of such lands, showing the number of shares of water stock sold under each of the respective water contracts so foreclosed and appurtenant as a water right to the land described therein, the number of the stock certificate of defendant, North Side Canal Company, Limited, evidencing such shares, and the description of the said several tracts of land.

XI.

That in the year 1913, at the time plaintiff (then known as Twin Falls North Side Land & Water Company) became insolvent, its stockholders owned and were operating a subsidiary or affiliated corporation, organized under the laws of the State of Idaho, known as the Twin Falls North Side Investment Company, Limited (hereinafter for brevity sometimes called the investment company), all the capital stock of which was owned by the construction company or its stockholders; that in the year 1913 it became apparent that the lien of the outstanding bonds aforesaid, issued by the con- [12] struction company, was in an amount far greater than the value of all its assets, including the assets of said subsidiary corporation; that, under these circumstances, to avoid the cost and expense of foreclosure of the trust deed aforesaid, securing said bond issue, which probably would have involved receivership of said construction company and said investment company, the stockholders of said construction company turned over to said bondholders' protective committee a majority of the capital stock of said construction company and all, or substantially all, of the capital stock of said investment company; that thereafter all such outstanding capital stock of said investment company was at all times owned and held by said bondholders' protective committee or the members thereof for the use and benefit of said bondholders, and thereafter said investment company was at all times operated by

said bondholders' protective committee as a land holding company, to take over upon foreclosure and to hold until resale and to resell to other settlers under said irrigation project lands and water rights acquired for the benefit of said bondholders through foreclosure of the Carey Act water contracts theretofore deposited in pledge, as aforesaid, with the trustee for said bondholders to secure said bonds; that is to say, said investment company was conducted and operated solely as a convenient agency and instrument of the bondholders to realize upon the mortgaged and pledged assets securing said bonds. [13]

In some instances, the aforesaid suits for the foreclosure of said water contracts referred to in paragraph X hereof were conducted in the name of the construction company; in some instances such proceedings were conducted in the name of said trustee for the bondholders; and in some instances of foreclosure upon said Carey Act water contracts, the property involved therein was bid in at the judicial sales resulting from such foreclosure in the name of the investment company on behalf and in the interest of said bondholders; and in other instances was bid in at said judicial sales by the trustee for the bondholders likewise on behalf of and in the interest of the bondholders; and in certain instances, in lieu of the foreclosure of said Carey Act water contracts, quitclaim deeds from the owners of the property secured by the terms of the water contracts were taken by said trustee for said bondholders or by said investment company, each acting

in the interest of said bondholders, said quitclaim deeds being taken either during the progress of foreclosure proceedings or to avoid foreclosure proceedings upon certain of said Carey Act water contracts evidencing the sale of water rights.

That all the lands described in "Exhibit B" hereto attached, with the water rights or shares of stock respectively appurtenant thereto, were acquired in the enforcement of said Carey Act contracts deposited with said trustee as security for said bonds.

XII.

That prior to December 11, 1936 all the capital stock of the construction company had been assigned and delivered to the said bondholders' protective committee, except [14] 200 shares thereof, which and the owners of which could not be found or located; that the capital stock of said construction company so assigned and delivered to the said bondholders' protective committee constituted upwards of 95% of the total authorized outstanding capital stock of said construction company; that thereafter and just prior to December 11, 1936, the then trustee for said bondholders conveyed to the construction company all the lands, water right contracts, and other property then held by it as such trustee, said conveyance being part of a plan and method by which all of the assets secured by said mortgage or deed of trust covering said irrigation project were to be and were transferred to the said bondholders; that further in pursuance of said plan, said trustee

shortly prior to December 11, 1936 released of record said mortgage or deed of trust; that further in pursuance of and as a convenient method of vesting in said bondholders title to all said lands, water right contracts, and other assets of every kind, character, and description, the said investment company was, by written agreement of merger of that date, merged into the construction company, which agreement of merger was duly authorized, executed, accepted, and filed in accordance with the laws of the State of Delaware and of the State of Idaho, it being provided by the terms of said merger agreement that the investment company ceased to exist as a corporate entity; and that the construction company constituted the surviving corporation, the name of such surviving corporation being by the terms of raid merger agreement and steps taken in pursuance thereof changed to Idaho Farms Company, which is the plaintiff herein; that as part of said merger, all of the capital stock of the invest- [15] ment company was cancelled and retired, as was also all of the outstanding capital stock of the Twin Falls North Side Land & Water Company (which was the construction company prior to said merger) except only 200 shares which and the owners of which could not be ascertained or located; that under the terms of said merger agreement a new stock issue of 37,601 shares in said Idaho Farms Company, of the par value of $45.00 each, was authorized to be issued and was issued pro rata among the bondholders in exchange for said bonds,

so that each of said bondholders should and did receive one share of the new stock of said Idaho Farms Company for each $100.00 original principal value of the bonds held by him; that by reason of said transfer and conveyance from said trustee to the construction company, and by reason of said merger, and in accordance with the provisions of the statutes of the State of Idaho and of the State of Delaware relating to merger of corporations, the plaintiff herein; that is to say, the original surviving construction company, became vested with all the rights, titles, privileges, and franchises of every kind and character in and to the lands and water rights listed and described in "Exhibit B" hereto attached, the former bondholders of the said construction company being, by reason of the stock distribution above set forth, the beneficiaries thereof.

That plaintiff, with respect to all the property listed and described in "Exhibit B", is the agency and instrumentality of said bondholders for realizing upon the assets mortgaged and pledged for their security in connection with moneys advanced for the construction of said irrigation system, and is entitled to all the rights of said original construction company and of said [16] trustee growing out of said state contracts, and each of them.

That plaintiff is the owner, in possession, and entitled to possession of all the property listed and described in said "Exhibit B" hereto attached, and each and every parcel thereof.

XIII.

That in all the said cases of foreclosure of water contracts or proceedings in lieu of such foreclosure whereby the properties listed and described in "Exhibit B" were acquired and obtained, only a small part of the original purchase price of the water rights secured by such water contracts had been paid by the purchasers prior to such foreclosure; and in most cases, only the initial payment thereon had been so paid, such initial payment in each case amounting to 10% of such purchase price; that all the lands listed and described in "Exhibit B" are situated within what are known, respectively, as the second segregation and the third segregation of said irrigation project, all of said listed lands being in the second segregation except the lands listed in Township 6 South, Range 13 East Boise Meridian, and the lands in Sections 18, 19, 20, and 30, Township 6 South, Range 14 East Boise Meridian, which are in the third segregation.

That by the terms of said state contract dated August 21, 1907, which related to the second segregation of said irrigation project, the construction company was authorized to sell water rights for $35.00 per share, that amount being by the terms of said state contract deemed necessary by the State of Idaho in order that plaintiff might be reimbursed for the costs and expenses of reclamation of said land and interest thereon, as contemplated by the applicable federal and state laws. [17]

That by the terms of said state contract dated January 2, 1909, which related to the third segrega-

tion of said irrigation project, the construction company was authorized to sell water rights for $45.00 per share, that amount being by the terms of said state contract deemed necessary by the State of Idaho in order that plaintiff might be reimbursed for the costs and expenses of reclamation of said land and interest thereon, as contemplated by the applicable federal and state laws.

That since the acquisition of the properties listed and described in "Exhibit B" by foreclosure or proceedings in lieu of foreclosure as aforesaid, plaintiff and its respective grantors have paid out large sums of money for taxes thereon to protect the priority of its lien and title thereto; so that now, in order that plaintiff may be reimbursed for the cost of construction of said irrigation project as contemplated and authorized by law, it is necessary that each of the parcels of property listed and described in said "Exhibit B" be resold at a price not less than the original selling price as authorized by said state contracts.

That the bondholders whose funds constructed said irrigation works and project have been by the proceeds of sales of water rights and collections thereon heretofore reimbursed to the extent of only 55% (without any interest) of the actual principal sums advanced by them and expended in the construction of said irrigation project; and if all the properties listed and described in said "Exhibit B" were to be resold by plaintiff at a price not less than the original selling price for the water rights re-

spectively appurtenant [18] thereto, as authorized by said state contracts, and if all the proceeds of such sales were paid to said bondholders, together with the proceeds of all other assets available for their repayment, they would then have received in the aggregate not more than 75% of the principal sums (without any interest) advanced by them as aforesaid and expended in the construction of said irrigation project.

XIV.

That plaintiff is informed and believes, and therefore alleges, that defendant, North Side Canal Company, Limited, has or claims to have some interest in or lien upon the lands and water rights listed in "Exhibit B", the exact nature of which is unknown to this plaintiff, but which interest or interests, lien or liens, if any there be, plaintiff alleges is each subject and subordinate to its own claim and title thereto. That said defendant has from time to time heretofore levied certain pretended assessments upon the lands and water rights listed and described in "Exhibit B" hereto attached; and plaintiff is informed and believes, and therefore alleges, that defendant asserts that by reason thereof it has a claim or claims or lien or liens upon said parcels of property, and each of them, which is prior and paramount to plaintiff's title and claim; but plaintiff alleges that any such claim or claims, lien or liens, if any there be, of said defendant upon any of the parcels of property described in "Exhibit B" hereto

attached is each subject and subordinate to plaintiff's own title and claim.

Wherefore, plaintiff prays that subpoena issue to the defandant, North Side Canal Company, Limited, requiring said defendant to answer this complaint according to the rules and practices of this court, and that said defendant be re- [19] quired in such answer to set forth the nature of its claim, interest in or lien upon the property listed and described in "Exhibit B", if any such there be, or be forever barred therefrom; and that all adverse claims of said defendant may be determined by decree of this court, and that by said decree it may be declared and adjudged that defendant has no estate, interest, claim, or lien whatsoever in or to said property, or any part thereof, and that it be forever barred and enjoined from asserting any such interest or claim, and that plaintiff may have such other and further relief in the premises as the nature of the case may require and as shall be proper and agreeable to the principles of equity and to this Honorable Court, including its costs herein.

EDWIN SNOW
Residence: Boise, Idaho.
A. F. JAMES
Residence: Gooding, Idaho.
Attorneys for Plaintiff [20]

[Duly verified.]

"EXHIBIT A"

General
Contract No.....

Twin Falls North Side Land and Water Company
Agreement

This agreement, made in duplicate this.....day of ..... 19....., between the Twin Falls North Side Land and Water Company (for convenience hereinafter called "the Company"), a corporation organized and existing under the laws of the state of Delaware, party of the first part, and..... (for convenience hereinafter called "the purchaser"), of....., State of ....., party of the second part, witnesseth:

That the Company has heretofore entered into a contract with the State of Idaho, acting by its State Board of Land Commissioners, whereby the Company bound itself to construct a system of canals and irrigation works for the reclamation and irrigation of certain lands therein described and referred to, which contract is of record in the office of the Register of the State Board of Land Commissioners at Boise City. Idaho.

That the Company has heretofore entered upon the work of construction of said irrigation system for the purpose of diverting from Snake River the waters thereof under the appropriation of the Twin Falls Land and Water Company by J. H. Lowell, Secretary, made October 11th, 1900, recorded in

Book I of Water Rights, at page 230, Lincoln County, Idaho, records and also under and by virtue of permit No. 1603 issued by the State Engineer of Idaho, together with other water rights taken for use on the lands hereinafter described.

That the State Board of Land Commissioners, pursuant to law and its rules and regulations, has notified the Company that it may proceed to sell or contract rights to the use of water flowing and to flow through the canals, and rights to and in said system of irrigation works, pursuant to law and to the terms of said contract with the State.

That the purchaser has made application to the Company to be permitted to purchase, upon the terms hereinafter set forth, the rights and privileges by said contract guaranteed, to the extent hereinafter named.

.....

That in consideration of the sum of..... Dollars cash in hand paid this day by the purchaser to the Company and in consideration of the covenants and agreements hereinafter contained it is agreed that in pursuance of the contract between the Company and the State, hereinafter called the State Contract, that the purchaser shall become entitled to..... shares of the capital stock of the North Side Canal Company, Limited, the certificate thereof to be in the form as follows, to-wit:

North Side Canal Company, Limited,

————Shares. ————————, 19—

This is to certify ..... is the owner of ..... shares of capital stock of the North Side Canal Company, Limited.

This certificate entitles the owner thereof to receive.....of a cubic foot of water per acre per second of time for the following described land:..... .....in accordance with the terms of the contract between the State of Idaho and the Twin Falls North Side Land and Water Company, and this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises of the Twin Falls North Side Land and Water Company, based upon the number of shares finally sold, in accordance with the said contract between the said company and the State of Idaho.

NORTH SIDE CANAL COMPANY, LIMITED,

By.....

President.

Attest:.....

Secretary [21]

Said certificate to be delivered as provided for in said State Contract and under the conditions therein stated.

The water which the purchaser shall have the right to conduct and receive through the said canal system shall be used upon and the water shall be-

come dedicated and be appurtenant to the following described land and no other.

Description—

Section—

Township—

Range E. B. M.—

Acres—

Containing a total of.....acres in..... county, Idaho.

And the parties hereto expressly agree as follows, to-wit:

1. This agreement is made in accordance with the provisions of said contract between the State of Idaho and the Company, which, together with the laws of the State of Idaho under which this agreement is made, shall be regarded as defining the rights of the respective parties, and shall regulate the provisions of the shares of stock to be issued to the purchaser by the North Side Canal Company, Limited.

2. The Company agrees that so long as it retains control of the North Side Canal Company, Limited, to-wit, so long as it shall continue to vote a majority of the stock of said Company, as provided by the State Contract, that it will cause said Company to keep and maintain the said irrigation system in good order and condition and to cause any necessary repairs thereto to be made as soon as practicable and expedient.

Said North Side Canal Company, Limited, is to have power to levy all necessary tolls, charges and

assessments upon all users of water in proportion to their respective holdings of stock, whether water is used or not, and the Company hereby agrees that no charges shall be made for the delivery of water from this date until after the first day of....., and that thereafter the annual charge of maintenance shall not, while the Company is in control of the said North Side Canal Company, Limited, exceed the sum of 35 cents for each and every acre to be charged against the entire acreage entered irrespective of the irrigation thereof.

The purchaser agrees to pay said charges at the office of the North Side Canal Company, Limited, on the first day of April of each year without notice.

3. The consideration for the water rights hereby agreed to be conveyed is the sum of $....., and the balance thereof remaining due after the cash payment hereinbefore acknowledged, to-wit, the sum of $....., is due and payable as follows, to-wit:

Payments—

Due—

Principal—

Interest—

Amount—

Interest from....., at 6 per cent per annum shall be paid annually as above specified, but if interest is not paid within thirty days from the date the same falls due then in such case it shall be computed for the entire period at the rate of eight per cent per annum.

All interest accruing prior to the date on which notice is given to the entryman that the Company is prepared to furnish water under the terms of this contract is hereby waived.

4. The purchaser hereby covenants and agrees that upon default in the payment of any of the payments above specified, or of the interest thereon, or any annual charge, toll or assessment, for the operation and maintenance of the irrigation system hereinbefore provided for, the Company may declare the entire amount of the principal purchase price for said water rights due, and may proceed either in law or equity to collect the same and to enforce any lien which it may have upon the water rights hereby contracted, or upon the lands to which said water rights are dedicated, or may at its option proceed to enforce any remedy given by the laws of Idaho to the Company against the purchaser.

And the purchaser hereby further covenants that he will and by these presents does hereby grant, assign, transfer and set over by way of mortgage or pledge to the Company to secure the payments of the amounts due and to become due on the purchase price of the water right hereby contracted to be sold any and all interest, and all rights which he now has or which may hereafter accrue to him under his contract with the State of Idaho, for the purchase of the lands to which the water rights hereby contracted for are dedicated, and further that immediately upon transfer to him of the legal title to said lands or any part thereof, he will, upon

demand, execute to the Company, in proper form, a mortgage or deed of trust with power of sale in such form as may be approved by ..... to secure the performance by him of the provisions of this contract, which said mortgage the purchaser hereby covenants and agrees shall be first lien upon the lands so mortgaged, superior to any and every incumbrance in favor of any persons whomsoever.

5. The purchaser agrees that the shares of stock purchased in the North Side Canal Company, Limited, shall be and they are hereby assigned and transferred to the Company and said Company and its agents are hereby authorized and empowered to vote said stock in such manner as it or its agents may deem proper at all meetings of the stockholders of said Company until 35 per cent of the purchase price of said stock has been paid.

6. It is agreed that no water shall be delivered to the purchaser from said irrigation system while any installment of principal or interest is due and unpaid from the purchaser to the Company or while any toll or assessment is due and unpaid from the purchaser to the North Side Canal Company, Limited.

7. This contract may be assigned by the Company and thereupon the payment of the principal and interest if so provided shall be due and payable to the assignee, but the payments for tolls, assessments and charges for the delivery of water....., shall, unless otherwise provided, be paid to the

North Side Canal Company, Limited, and payment thereof may be enforced by it.

In Witness Whereof, The parties have hereunto subscribed their names, and the Company has caused its seal to be affixed the day and year above written in duplicate.

TWIN FALLS NORTH SIDE LAND AND WATER COMPANY

By.....

Vice President.

.....

Ass't Secretary.

.....

Entryman.

By.....

Attorney-in-Fact.

In the Presence of:

.....

.....

Witnesses. [22]

County of.....

State of.....—ss.

On this.....day of....., in the year 19....., before me, ..., a Notary Public in and for said County and State, personally appeared....., known to me to be the person whose name is subscribed to the above instrument.....

Attest my hand and official seal the day and year in this certificate first above written.

.....

[Seal] Notary Public.

My commission expires.....

I hereby certify that the above is a true copy of the original contract in the above matter.

Attest: .....

Assistant Secretary Twin Falls North Side Land & Water Company.

The foregoing contract is hereby approved, and has been registered this ..... day of ....., 19.....

STATE BOARD OF LAND COMMISSIONERS,

By.....

Milner, Idaho,....., 19.....

For value received this contract, Principal and interest, is hereby assigned and transferred to..... ....., by authority of a resolution of the Board of Directors of the Twin Falls North Side Land and Water Company.

TWIN FALLS NORTH SIDE LAND AND WATER COMPANY.

By .....

No.....

Dated ..... 19.....

Contract

Twin Falls North Side Land and Water Co.

with

.....

.....

.....

State of Idaho, No.....
County of.....—ss.

I hereby certify that this instrument was filed for record at the request of..... at.....o'clock.....M., this.....day of.....19..... in my office, and duly recorded in book.....at page.....

.....

Ex-Officio Recorder.

By.....

Deputy.

Fees, $.....

Return to.....

Times Print, Jerome, Idaho

Exhibit B omitted at appellant's request, as it is included in Exhibit I attached to Findings of Fact.

[Endorsed]: Filed Nov. 24, 1937. [23]

[Title of District Court and Cause.]

DEFENDANT'S ANSWER.

Comes now North Side Canal Company, limited, the above named defendant, and in answer to plaintiff's complaint on file herein, admits, denies and alleges:

I.

This defendant is not advised, save by said complaint, as to whether plaintiff is a corporation, as alleged in paragraph I of its complaint, and de-

fendant, therefore, leaves plaintiff to make such proof thereof as it may deem necessary or proper.

II.

Admits each and all of the allegations of Paragraph II of said complaint.

III.

Admits each and all of the allegations of Paragraph III of said complaint.

IV.

Admits all of the allegations of Paragraph IV of said complaint except that this defendant is not advised, save by said complaint, as to whether plaintiff was, during the times mentioned in said Paragraph IV, known as Twin Falls Northside Land & Water Company, and defendant being without knowledge as to the relationship between plaintiff and said Twin Falls Northside Land & Water Company, it prays that plaintiff may be re- [24] quired to make strict proof of said allegations and of its relationship to said Twin Falls Northside Land & Water Company and of its claim as successor in interest to the rights granted to or acquired by said Company by and under said state contract and the laws of the State of Idaho relating to Carey Act projects.

V.

Admits generally the allegations contained in Paragraph V of said complaint, but prays leave to refer to the contract between the State of Idaho

and said Twin Falls Northside Land & Water Company relative to the construction of the irrigation system referred to in said complaint and the contract between said Twin Falls North Side Land & Water Company and the settlers when the same are produced in evidence for a better and more accurate and complete statement of the facts referred to in said Paragraph V, and defendant further prays that the plaintiff be required to produce said contracts in evidence.

VI.

Admits generally the allegations contained in Paragraph VI of the complaint, except that defendant denies that said construction company completed said irrigation system for the reclamation of a gross area of approximately 200,000 acres but, on the contrary, this defendant alleges the fact to be that said irrigation system was not fully completed by said construction company but was delivered and turned over to this defendant in an incomplete condition and without an adequate or sufficient water supply to irrigate 170,000 acres of land and this defendant has been required and compelled, in order to better protect the settlers and land owners under said irrigation system, to expend large sums of money for the improve- [25] ment and completion of said irrigation works and for the purchase and acquisition of additional water and water rights and for storage rights and storage capacity in reservoirs not constructed by said construction company or at its expense.

VII.

This defendant admits that said Twin Falls North Side Land & Water Company executed to the American Trust & Savings Bank, as trustee, a certain mortgage or deed of trust, as security for an issue of bonds, and that the Construction Company pledged under said Trust Deed and as further security for said bonds, a large number of Settlers' Contracts, substantially of the form attached to plaintiff's complaint as "Exhibit A," and admits that said Trustee was thereafter merged into and became Continental and Commercial Trust & Savings Bank, which was thereafter merged and consolidated with the Continental and Commercial National Bank of Chicago under the name of Continental National Savings Bank & Trust Company, but this defendant is not advised, save by said complaint, as to the other facts alleged in Paragraph VII of the complaint herein and, being without knowledge as to the facts set forth in said paragraph and not hereinbefore expressly admitted, this defendant prays that plaintiff may be required to make strict proof of each and every allegation in said Paragraph VII, and particularly as to the terms of the Trust Deed securing said issue of bonds, and the amount of water contracts deposited thereunder, and as to the amount and use of the funds obtained from the sale of said bonds and as to whether all contracts for the sale of water rights were alike.

VIII.

Defendant admits that about the year 1913, and before the irrigation system had been fully completed, the said con- [26] struction company became insolvent, and that a Bondholders' Committee was appointed, but this defendant is without knowledge as to the manner in which said bondholders' committee was appointed and for whom it acted, or how funds were obtained for expenditures made by the committee or under its direction, or as to the amount expended in the construction or for the completion of said irrigation works or for the acquisition of water or water rights for said project, and defendant is without knowledge as to whether such expenditures were made for the sole use and benefit of the bondholders and as to the control, by such bondholders' committee, of the construction company and the property and assets of such company, and being without such knowledge this defendant prays that plaintiff be required to make strict proof of each and every allegation contained in said Paragraph VIII, except such as are herein expressly admitted.

IX.

Defendant admits that certain contracts entered into by the construction company for the sale of water rights or shares in such irrigation system were deposited and pledged with and assigned to the Trustee under the said mortgage and deed of trust, but it denies that all contracts so entered

into were so pledged or deposited with said Trustee, and this defendant is without knowledge as to the amount payable under the contracts deposited under said Trust Deed and as to the amount payable under contracts not deposited with said trustee under said Deed of Trust, and defendant is without knowledge as to the amount collected by said Trustee under said contracts and as to how the same was collected and as to the amount still remaining unpaid under contracts entered into by said construc- [27] tion company for the sale of water rights, and being without such knowledge, defendant prays that plaintiff be required to make strict proof of each and every allegation contained in said paragraph IX not hereinbefore expressly admitted, and as to the amount paid and the amount remaining unpaid under each and every contract not paid in full, and as to plaintiff's title to such contracts and each and every of them, and as to plaintiff's title to the lands described in such contracts, and each of them.

X.

Defendant admits that default was made in the payment of principal and interest on many contracts entered into by the construction company for the sale of water rights, and that proceedings for the enforcement and foreclosure of the lien evidenced by such contracts were instituted in the District Court of the State of Idaho, for the County in which said lands are situated, but defendant is

without knowledge as to what lands described in "Exhibit B" attached to plaintiff's complaint were acquired by the construction company or the Trustee or the investment company, or plaintiff, through the foreclosure of such contracts, or otherwise, and defendant is without knowledge as to whether plaintiff is now the owner of the lands described in said Exhibit B or any of them, and as to how it acquired title to said lands, if at all, and defendant, therefore prays that plaintiff be required to make strict proof of each and every allegation contained in said paragraph X not herein expressly admitted.

XI.

This defendant is without knowledge as to the allegations contained in Paragraph XI of the complaint, and particularly [28] as to the relationship of the corporations therein referred to, and the ownership of the stock thereof, and as to the dealings and contracts between the construction company and the bondholders' protective committee, and as to what stock, if any, was held by said committee or the members thereof, for the use and benefit of the bondholders, or anyone else, and as to the control of said bondholders' committee of or over any of the corporations in said Paragraph mentioned, and as to the manner in which lands and water rights were acquired by said bondholders' committee or the corporations therein referred to, and being without knowledge of the facts set forth in said Paragraph, this defendant prays that plain-

tiff may be required to make strict proof of each and every allegation contained in said Paragraph XI.

XII.

This defendant is without knowledge of the facts alleged in Paragraph XII of said complaint, and being without knowledge of the facts set forth in said Paragraph, it prays that plaintiff be required to make strict proof of each and every allegation contained in said Paragraph XII.

XIII.

This defendant is without knowledge as to the facts alleged in Paragraph XIII of said complaint and, being without knowledge as to the facts set forth in said Paragraph, it prays that plaintiff may be required to make strict proof of each and every allegation contained in said Paragraph XIII.

XIV.

Defendant admits that it has and claims to have some interest in or lien upon the lands and water rights listed in "Exhibit B" attached to plaintiff's complaint. Denies that [29] said interest or interests, lien or liens is each subject and subordinate, or subject or subordinate to plaintiff's own claim and title thereto. Denies that the assessments which defendant has heretofore levied from time to time have been or are merely pretended assessments upon the lands and water rights listed and described in "Exhibit B" attached to plaintiff's com-

plaint. Admits that defendant asserts that its claim or claims or lien or liens upon said parcels of property, and each of them, is prior and paramount to plaintiff's title and claim therein. Denies that any claim or claims, lien or liens of this defendant upon the parcels of property described in said "Exhibit B" or either or any of said claims or liens is subject and subordinate, or subject or subordinate to plaintiff's own title and claim or to plaintiff's own title or claim.

Further answering the allegations or plaintiff's complaint, and by way of a further, separate and affirmative defense thereto defendant alleges:

I.

That the defendant herein is now and at all times mentioned herein has been a corporation organized, acting and existing under and by virtue of the laws of the State of Idaho and is now and during all of said times has been a corporation operating irrigation works for the purpose of furnishing water or reclaiming in whole or in part lands granted, segregated or set apart by the United States to the State of Idaho, or settled under the provisions of the Act of Congress, commonly known as the "Carey Act," entitled "An Act making appropriation for Sundry Civil Expenses of the Government for the Fiscal year ending June 30, 1895 and for other purposes," approved August 18, 1894, and the amendments and supplements thereof, together with [30] other lands embraced in homestead and desert entries as

provided in contracts between the State of Idaho and the Twin Falls North Side Land and Water Company under the dates of April 15, 1907, August 21, 1907 and January 2, 1909, and amendments and supplements thereof. That during all of said time the control of said irrigation works has been and now is actually vested in those entitled to the use of the water from such irrigation works, for the irrigation of the lands to which the water therefrom is appurtenant. That defendant, at all of said times has been and is now commonly known as a "Carey Act Operating Company."

II.

That the lands now comprising the irrigation project, which have been and are now being furnished water for irrigation purposes by the defendant through its system of irrigation works, are located in the Counties of Jerome, Gooding and Elmore, State of Idaho.

III.

That at all times during its operation as a "Carey Act Operating Company," defendant has levied and assessed reasonable tolls, assessments and charges against the lands served by it and the water rights appurtenant thereto for the purpose of maintaining and operating its irrigation works and conducting its business and meeting its obligations, and has generally collected said tolls, assessments and

charges from the owners of said lands and water; that said tolls, assessments and charges have been equally and ratably assessed upon and according to the number of shares or water rights held or owned by the owners of such lands as appurtenant thereto.

IV.

That during the forepart of the year 1935 and prior to the [31] 15th day of March, the defendant determined that it would be necessary to levy a toll, assessment or charge of $1.00 per share of stock in said defendant company (each share of stock representing a water right to one acre of land under said project); that on or about the 15th day of March, 1935 the defendant caused a statement to be made, executed and acknowledged by its Secretary and thereafter caused the same to be duly and regularly recorded in the office of the County Recorder of Jerome County Idaho on March 25, 1935 in Book 105 at Page 407, which statement in writing contained the name of the defendant company, the general or common name of the canal system and irrigation works operated by it, the amount of the toll, assessment or charge to be levied and assessed against the land and water rights appurtenant thereto, and the dates when payable. That a true and correct copy of said Statement in writing, marked "Defendant's Exhibit 1" is attached hereto and is by reference thereto made a part hereof.

V.

That some of the tolls, assessments and charges levied and assessed by defendant for the year 1935 were not paid and on or about the 30th day of December, 1935 defendant caused its Notice of Claim of Lien for Water Charges for the fiscal year commencing April 1, 1935 and ending March 31, 1936, to be duly and regularly filed in the Office of the County Recorder of Jerome County, Idaho, in Book 92 at Page 453, a true and correct copy of which said Notice, marked "Defendant's Exhibit 2," is attached hereto and is by reference thereto made a part hereof. [32]

VI.

That during the forepart of the year 1936 and prior to the 16th day of March, the defendant determined that it would be necessary to levy a toll, assessment or charge of $1.25 per share of stock in said defendant company (each share of stock representing a water right to one acre of land under said project); that on or about the 16th day of March, 1936 the defendant caused a statement to be made, executed and acknowledged by its Secretary and thereafter caused the same to be duly and regularly recorded in the office of the County Recorder of Jerome County, Idaho on March 17, 1936 in Book 110 at Page 88, which statement in writing contained the name of the defendant company, the general or common name of the canal system and irrigation works operated by it, the amount of the

toll, assessment or charge to be levied and assessed against the land and water rights appurtenant thereto, and the dates when payable. That a true and correct copy of said Statement in writing, marked "Defendant's Exhibit 3" is attached hereto and is by reference thereto made a part hereof.

VII.

That some of the tolls, assessments and charges levied and assessed by defendant for the year 1936 were not paid and on or about the 31st day of December, 1936, defendant caused its Notice of Claim of Lien for Water Charges for the fiscal year commencing April 1, 1936 and ending March 31, 1937, to be duly and regularly filed in the office of the County Recorder of Jerome County, Idaho, in Book 92 at Page 484, a true and correct copy of which said Notice, marked "Defendant's Exhibit 4" is attached hereto and is by reference thereto made a part hereof. [33]

VIII.

That during the forepart of the year 1937 and prior to the 22nd day of March, the defendant determined that it would be necessary to levy a toll, assessment or charge of $1.50 per share of stock in said defendant company (each share of stock representing a water right to one acre of land under said project); that on or about the 22nd day of March, 1937 the defendant caused a statement to be made, executed and acknowledged by its Secretary

and thereafter caused the same to be duly and regularly recorded in the office of the County Recorder of Jerome County, Idaho on March 24, 1937 in Book 110 at Page 260, which statement in writing contained the name of the defendant company, the general or common name of the canal system and irrigation works operated by it, the amount of the toll, assessment or charge to be levied and assessed against the land and water rights appurtenant thereto, and the dates when payable. That a true and correct copy of said Statement in writing, marked "Defendant's Exhibit 5" is attached hereto and is by reference thereto made a part hereof.

IX.

That some of the tolls, assessments and charges levied and assessed by defendant for the year 1937 were not paid and on or about the 29th day of December, 1937, defendant caused its Notice of Claim of Lien for Water Charges for the fiscal year commencing April 1, 1937 and ending March 31, 1938, to be duly and regularly filed in the office of the County Recorder of Jerome County, Idaho, in Book 92 at Page 526, a true and correct copy of which said Notice, marked "Defendant's Exhibit 6" is attached hereto and is by reference thereto made a part hereof. [34]

X.

That during the month of March in each of the years 1935, 1936 and 1937 defendant caused its state-

ments in writing in all respects respectively similar to defendant's Exhibits numbered 1, 3 and 5 attached hereto, to be recorded in the office of the County Recorder of Gooding County, Idaho; and during the month of December in each of the years 1935, 1936 and 1937 defendant caused its Notice of Claim of Lien for Water charges for the fiscal year commencing April 1, 1935 and ending March 31, 1936, the fiscal year commencing April 1, 1936 and ending March 31, 1937 and for the fiscal year commencing April 1, 1937 and ending March 31, 1938, for the tolls, assessments and charges remaining unpaid for said fiscal years, to be recorded in the office of the County Recorder of Gooding County, Idaho; that said Notices of Claims of Liens were in all respects similar to Defendant's Exhibits 2, 4 and 6 attached hereto except descriptions necessary to identify its unpaid assessments, tolls and charges levied and assessed against lands located in Gooding County, Idaho.

XI.

That on or about December 24, 1937, defendant herein commenced an action in the District Court of the Eleventh Judicial District of the State of Idaho, in and for the County of Jerome wherein defendant herein is plaintiff and Idaho Farms Company, a corporation, successor to Twin Falls North Side Investment Company, Limited, a corporation, is defendant, which said action was commenced for the purpose of foreclosing its claim of lien for unpaid assessments, tolls and charges for the fiscal

year commencing April 1, 1935 and ending March 31, 1936 against the lands of said Idaho Farms Company, and for the purpose of fore- [35] closing its claim of lien for unpaid assessments, tolls and charges for the fiscal year commencing April 1, 1936 and ending March 31, 1937 against the lands of said Idaho Farms Company, as set out and claimed in its Notices of Claims of Lien, copies of which, marked "Defendant's Exhibits 2 and 4" are attached hereto. That said action is numbered 2294. That a true and correct copy of the complaint filed in said action, marked "Defendant's Exhibit 7" is attached hereto and by reference thereto is made a part hereof. That a true and correct copy of the Lis Pendens filed in said action, marked "Defendant's Exhibit 8" is attached hereto and by reference thereto is made a part hereof. That thereafter, and on or about the 18th day of February, 1938, summons was duly and regularly issued in the above entitled case and was thereafter duly and regularly served upon the defendant.

XII.

That on or about December 24, 1937 defendant herein commenced an action in the District Court of the Eleventh Judicial District of the State of Idaho, in and for the County of Jerome, wherein defendant herein is plaintiff and Continental and Commercial Trust and Savings Bank, a corporation, Idaho Farms Company, a corporation, and Continental National Bank and Trust Company of

Chicago, a corporation, are defendants, which said action was commenced for the purpose of foreclosing its claim of lien for unpaid assessments, tolls and charges for the fiscal year commencing April 1, 1935 and ending March 31, 1936 against the lands of said defendants, and for the purpose of foreclosing its claim of lien for unpaid assessments, tolls and charges for the fiscal year commencing April 1, 1936 and ending March 31, 1937, against the lands of said defendants, as set out and claimed [36] in its Notices of Claims of Lien, copies of which, marked "Defendant's Exhibits 2 and 4" are attached hereto. That said action is numbered 2295. That a true and correct copy of the complaint filed in said action, marked "Defendant's Exhibit 9" is attached hereto and by reference thereto is made a part hereof. That a true and correct copy of the Lis Pendens filed in said action, marked "Defendant's Exhibit 10" is attached hereto and by reference thereto is made a part hereof. That thereafter, and on or about the 18th day of February, 1938 summons was duly and regularly issued in the above entitled case and was thereafter duly and regularly served upon the defendants.

XIII.

That two separate actions were commenced by said North Side Canal Company, Limited, in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding against the plaintiff herein and its predecessors

in interest on the 24th day of December, 1937, for the purpose of foreclosing its Claims of Liens for unpaid assessments, tolls and charges filed and recorded in the Recorder's Office of Gooding County, Idaho for the years 1935 and 1936, which said Notices of Claims of Liens are described in Paragraph X of this affirmative defense. That the complaints in said actions were generally similar to the complaints filed in said actions numbered 2294 and 2295 commenced in Jerome County, Idaho. That said actions were commenced within two years from the date of filing of said Notices of Claims of Liens in the Recorder's Office of said Gooding County.

That a Lis Pendens in each of said cases describing the liens claimed and the property against which said liens were claimed was filed for record in the office of the County Recorder of Gooding County on the said 24th day of December, 1937. [37] That thereafter, and on or about the 18th day of February, 1938 a summons was duly and regularly issued in each of said cases and service thereof was thereafter made upon each and all of said defendants. That said cases are now pending for trial.

XIV.

That all of the things done by the defendant, as in this affirmative defense set out, have been done by it in furtherance of its claim of benefits arising under the provisions of Chapter 19 of Title 41 of Idaho Code Annotated and for the purpose

of asserting, preserving and enforcing its lien against said lands and water rights.

XV.

That by reason of the things set forth in this affirmative defense defendant herein has a lien upon and against plaintiff's said lands, premises and the water rights appurtenant thereto described in "Exhibit B" attached to plaintiff's complaint on file herein, for the tolls, assessments and charges levied and assessed against plaintiff's said lands and water rights for the years 1935, 1936 and 1937, as set out in its notices of Claims of Liens and in its complaints hereinabove described, together with interest thereon at the rate of six per cent (6%) per annum from the date said assessments, tolls and charges first became due and payable, which said lien is a first and prior lien, except as to the lien for taxes. That defendant's said lien is in all respects paramount and superior to any title, interest, claim or lien of plaintiff in, to or against said lands and water rights and said lien of this defendant should not and may not be removed or quieted by this proceeding. [38]

For a second and further affirmative defense to plaintiff's complaint on file herein defendant alleges:

I.

Defendant now refers to the allegations set out in its First Affirmative Defense and by reference

thereto makes said allegations a part of this, its Second Affirmative Defense, as fully and completely as though said allegations were set out herein at length.

II.

That in addition to the civil cases described in defendant's First Affirmative Defense there are now pending in the District Court of the Eleventh Judicial District of the State of Idaho, in and for the County of Jerome, Civil Cases numbered 2052, 2053, 2133, 2134, 2214 and 2215, and there are now pending in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding, Civil Cases numbered 3035, 3036, 3118, 3119, 3191 and 3192. That this defendant is plaintiff in each and all of said cases and plaintiff herein and its predecessors in interest are defendants in each and all of said cases. That all of said cases were commenced long before this suit was commenced and said Civil Cases were commenced for the purpose of foreclosing liens claimed by this defendant against certain lands of plaintiff, together with the water rights appurtenant thereto, which said liens have been claimed and are now being protected and foreclosed under and pursuant to the provisions of Chapter 19 of Title 41 of Idaho Code Annotated. That during the month of January, 1938, this defendant, as plaintiff in said civil case numbered 2053 petitioned the District Court of the Eleventh Judicial District of the State of Idaho, in and for the [39] County of Jerome for

an Injunction enjoining Idaho Farms Company from prosecuting this action or litigating in this action any of the questions or controversies involved in the civil cases in this Paragraph and in said First Affirmative Defense described. And the said Court thereafter, and on the 21st day of February, 1938 enjoined said Idaho Farms Company from further prosecuting this action insofar as it affects or involves the liens and controversies involved in the cases commenced in the District Court in Jerome County, Idaho, before the commencement of this action. That after the said State Court had enjoined Idaho Farms Company, as aforesaid, counsel for the respective parties to the actions commenced in the District Court of Gooding County, Idaho orally stipulated and agreed that in this case the controversies and liens involved in the Gooding County cases commenced prior to the commencement of this case would not be litigated and in accordance with said Agreement, on the 14th day of February, 1938, counsel for plaintiff herein filed their written disclaimer announcing to this Court that plaintiff would not claim the right to litigate in this suit the validity of the defendant's liens for the years 1932, 1933 and 1934.

And defendant now states that the questions, controversies and issues raised in this suit are not different from, but are the same and identical questions, controversies and issues raised in the said suits now pending in the said State District Courts; that said State Courts and this Court should not

both be required to adjudicate and determine said issues but the determination and adjudication thereof should be left solely to the Courts which first acquired jurisdiction, to-wit, the State District Court in Jerome County, Idaho, and the State District Court in Gooding County, Idaho. That the subject matter of, and the parties to this suit are the same as the sub- [40] ject matter and parties to said actions now pending in said State Courts. That said State Courts now have jurisdiction over all of the subject matter of this suit and can and will fully and completely determine and adjudicate all of the questions, controversies and issues involved herein. That said actions now pending in said State Courts call for the construction and interpretation of Statutes of the State of Idaho and the determination and adjudication of the relative priorities of liens claimed by the parties to this suit and the parties to said State Court actions arising under statutes of the State of Idaho. That the commencement of this suit in the District Court of the United States by Idaho Farms Company is an attempt to nullify or evade any decision that may be rendered in said State Court actions and is an attempt to harass and annoy this defendant by a multiplicity of suits and by conflict of jurisdiction and conflict of decisions. That the prosecution of this suit in the United States District Court may lead to conflicting judgments and decisions and to embarrassment and substantial prejudice to this defendant.

That because of the foregoing facts this action ought not be to further prosecuted but should be dismissed or abated pending the trial of said State Court actions.

For a third and further affirmative defense to plaintiff's complaint on file herein defendant alleges: [41]

That of the moneys collected by virtue of the assessments, tolls and charges levied annually by North Side Canal Company, Limited, in pursuance of the provisions of Chapter 19 of Title 41 of Idaho Code Annotated, against the lands and water rights on its said irrigation project a very substantial portion thereof has been expended for the purchase of additional water, water rights and storage capacity, and large sums have been and are necessarily expended each year by this defendant for the upkeep, repair and maintenance of its irrigation system and works, which system and works is very extensive in character, and for the purpose of improving and enlarging said system and works. That said upkeep, repair and maintenance of said irrigation system and works and the improvement and enlargement thereof have been done and made regularly each year for the benefit of all water-users on said project, including plaintiff herein and for the benefit and protection of all lands and water rights on said irrigation project, including the lands and water rights described in "Exhibit B" attached to plaintiff's complaint, and without the expenditure of said substantial sums of money for

the upkeep, repair and maintenance of said irrigation system and works, said irrigation system and works would have so deteriorated that the lands and water rights on said irrigation project, including the lands and water rights described in "Exhibit B" attached to plaintiff's complaint, would long ago have become of little or no value.

That because of the failure, refusal and neglect of plaintiff herein to pay the assessments, tolls and charges levied and assessed by North Side Canal Company, Limited against the [42] lands and water rights of plaintiff herein, described in said "Exhibit B" for the years 1932, 1933, 1934, 1935, 1936 and 1937 said lands and water rights have not borne their share of the expense of the upkeep, repair, maintenance, improvement and enlargement of said irrigation system and works and because of said failure, refusal and neglect to pay said assessments, tolls and charges for said years an extra burden has been imposed upon the other water-users on said irrigation project and upon the other lands and water rights on said project. That because of said neglect, failure and refusal of plaintiff herein to pay said assessments, tolls and charges for the above named years levied against its lands and water rights described in said "Exhibit B" of plaintiff's complaint and because of the payment by other water-users on said irrigation project of all the expense incidental to the necessary upkeep, repair, maintenance, improvement and enlargement of said system and works, plaintiff herein and its

said lands and water rights have received and are now receiving a benefit without any cost or expense whatsoever.

That in equity and good conscience plaintiff herein and its lands and water rights, described in said "Exhibit B" attached to plaintiff's complaint on file herein, should not be permitted to escape their just burdens but should be required to pay their equal and ratable proportion of the expense incident to said upkeep, repair, maintenance, improvement and enlargement of said system and works.

For a fourth and further affirmative defense to plaintiff's complaint on file herein defendant alleges:

That the liens now being asserted by this defendant against the lands and water rights of plaintiff have been law- [43] fully acquired in pursuance of the provisions of the statutes of Idaho and may not be obviated or quieted in this proceeding.

For a fifth and further affirmative defense to plaintiff's complaint on file herein defendant alleges:

That plaintiff herein and its predecessors in interest have from the time the lands and premises set out and desccribed in "Exhibit B" attached to plaintiff's complaint on file herein were reclaimed, regularly paid the assessments, tolls, and charges made by North Side Canal Company, Limited against said lands and premises for the purpose of maintaining and operating its irrigation works and conducting its business and meeting its obligations,

up to and including the year 1931, and have during all of said period of time acquiesced in and consented to said assessments, tolls and charges as lawful charges and have treated the same as the basis for liens prior, superior and paramount in character to any lien or liens claimed or which might be claimed under the provisions of Chapter 17 of Title 41 of Idaho Code Annotated, and are now estopped from denying the legality of the liens of defendant company for the years 1935, 1936 and 1937 against plaintiff's lands and premises and the water rights appurtenant thereto. That about the year 1913 and until about one year ago, when plaintiff claims to have acquired the lands described in Exhibit B attached to the complaint herein, R. E. Sheppard, now president of plaintiff, was the representative of the bondholders' committee referred to in plaintiff's complaint, in charge of said irrigation system and of the distribution of water therefrom, that as the representative of said bondholders' committee said R. E. [44] Sheppard was the general manager of said Twin Falls North Side Land & Water Company and was the manager and officer in charge of the said Twin Falls North Side Investment Company and, as such, he was also elected president of this defendant January 2, 1917 and thereafter was continuously in charge of its business and affairs, until about May 1, 1920. That on or about September 20, 1921 the said R. E. Sheppard was selected as manager of this defendant and continued to act as manager thereof from said date until on or about

March 31, 1937. That as the president or general manager of this defendant, said R. E. Sheppard was charged with the duty of preparing or assisting in preparing defendant's budget of receipts and expenses, and he was charged with the duty of determining the amount of money required for carrying on the business of this defendant and the lands and water stock that should be assessed and contribute to the payment of defendant's outlays and expenses; that during all of the period when said R. E. Sheppard was president or general manager of this defendant, he advised and recommended that the money required by this defendant, and included in its budget as prepared under his direction, should be pro-rated over all the stock of this defendant that had been made appurtenant to land, including the lands described in Exhibit B attached to plaintiff's complaint.

That said R. E. Sheppard, as manager in charge of the business of said bondholders' committee on said irrigation project and as an officer and the general manager of the construction company and investment company, approved and concurred in the assessments levied by this defendant against the lands described in said Exhibit B and other lands similarly situated, and against the stock appurtenant to such lands, and he caused said charges and assessments to be paid regularly from year to [45] year until the year 1932; that at no time did said R. E. Sheppard claim that said land or the stock appurtenant thereto was for any reason exempt

from the assessments levied by this defendant, or that the so-called Carey Act lien, on which plaintiff now relies, was prior or superior to this defendant's lien for maintenance under Title 41, Chapter 19, Idaho Code Annotated; that plaintiff herein and its predecessors in interest, from the time water was first made appurtenant to the lands and premises set out and described in Exhibit B, attached to plaintiff's complaint, have paid the assessments, tolls and charges so levied and assessed by this defendant against such lands and stock, up to and including the year 1931; that at no time, until the commencement of this action, has plaintiff or its predecessors in interest, or any of the officers or employees, agents or representatives of said parties, claimed that this defendant's lien, under said Chapter 19, Title 41, was subject and subordinate to the lien under Chapter 17, of Title 41 of Idaho Code Annotated; and this defendant, having great confidence in the judgment and knowledge of said R. E. Sheppard as to the right of this defendant to make assessments against all lands to which its stock had been made appurtenant and relying upon his judgment, counsel, advice and direction has accordingly apportioned its budget for the money required for the operation of its irrigation system over the lands described in said Exhibit B and other lands to which its stock had been made appurtenant; that by reason of said assessments having been made in the manner aforesaid the position of defendant had been materially changed in

that it has incurred debts and obligations which it otherwise would not have incurred and has made expenditures and improvements which otherwise it would not have made; that a great financial loss and injustice will be [46] sustained by this defendant if plaintiff should now be permitted to change its position as to this defendant's right to make said assessments and to collect the same as contemplated by the laws under which the same were made, and plaintiff is now estopped by its conduct and by the conduct of its predecessors in interest, and barred by its and their laches from denying the legality and priority of the liens of this defendant for the years 1935, 1936 and 1937 against plaintiff's lands and premises and the water rights appurtenant thereto.

For a sixth and further affirmative defense to plaintiff's complaint on file herein, defendant alleges:

That the water rights which plaintiff alleges are appurtenant to the lands described in "Exhibit B" attached to its complaint herein were sold by said Twin Falls Northside Land & Water Company while said corporation had the full and absolute control and management of this defendant and voted all its issued stock under the rights granted or reserved to said construction company under the said state contract and while the officers and employees of said construction company were the officers and directors of this defendant; that the water rights so sold and made appurtenant to the

lands described in said "Exhibit B" were in excess of the water which said construction company made available for said irrigation project and in excess of the amount which said construction company should and ought to have sold under the said state contract, and because of such wrongful acts of the construction company a shortage of water was created on said irrigation project, and the other settlers and stockholders of this defendant have suffered and sustained large losses by reason of such shortage, and this defendant has been compelled, by reason of said wrongful acts, to purchase storage water and additional water at a large expense to its stockholders; that the water so sold for use upon the lands described in said "Exhibit B" has not been used thereon for more than five years prior to the commencement of this action; that a large part of [47] said lands has never been reclaimed or had water applied to beneficial use thereon, but said lands are, and during all the times mentioned in plaintiff's complaint have been, to a large extent, in the same condition as they were prior to the alleged sale of water rights for use thereon; that the water alleged by plaintiff to have been acquired for use on said lands has been lost and abandoned by the failure, for more than five years last past, to apply such water to beneficial use; that by reason of the facts above set forth and the laws of the State of Idaho in such cases made and provided, plaintiff is not entitled to have any water delivered from this defendant's irriga-

tion system for use on the lands and premises described in "Exhibit B" attached to plaintiff's complaint.

For a seventh and further affirmative defense to plaintiff's complaint on file herein defendant alleges:

That this Court does not possess the power or authority or the jurisdiction to grant the relief prayed for by the plaintiff herein.

Wherefore, Defendant prays judgment as follows:

1.—That this action be dismissed or abated pending the trial of the cases heretofore commenced in the District Court of the Eleventh Judicial District of the State of Idaho in and for the County of Jerome, and the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding.

2.—In the event the Court does not abate this action, that plaintiff take nothing under and by virtue of its complaint and that said complaint in the above entitled action be dismissed.

3.—In the event the Court does not abate this action, that the liens claimed by defendant herein against the lands and water rights of the plaintiff for the years 1935, 1936 and 1937 under [48] Chapter 19 of Title 41 Idaho Code Annotated be declared prior, paramount and superior to the title, interest and claim of plaintiff in said lands and water rights.

4.—That defendant be allowed its costs and disbursements herein expended, and such other and further relief as to the Court may seem meet in the premises.

WAYNE A. BARCLAY
Residing at Jerome, Idaho
RICHARDS & HAGA
Residing at Boise, Idaho
FRANK L. STEPHAN
J. H. BLANDFORD
Residing at Twin Falls, Idaho
Attorneys for Defendants.

(Duly verified.)

(Service accepted.) [49]

DEFENDANT'S EXHIBIT 1.

Know All Men by These Presents, That, Whereas, North Side Canal Company, Limited, is a corporation operating in whole or in part, irrigation works constructed or used for the purpose of furnishing water to or reclaiming in whole or in part land heretofore granted, segregated, and set apart by the United States to the State of Idaho under the provisions of the Act of Congress commonly known as the Carey Act, entitled "An Act making appropriation for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes," approved August 18th, A. D. 1894, and the amendments and supplements thereof, said lands and irrigation system

being located in the Counties of Jerome, Gooding, and Elmore, State of Idaho, and the general or common name of such canal system being North Side Canal System; and,

Whereas, The said North Side Canal Company, Limited, does hereby claim all rights to assert the lien to enforce collection of tolls, assessments, and charges for the operation and maintenance of said canal system as provived by Chapter 19 of Title 41, Idaho Code Annotated;

Now, Therefore, It Is Certified, Stated, and Declared, That the name of such Company is North Side Canal Company, Limited, a corporation organized, acting, and existing under and by virtue of the laws of the State of Idaho;

That the general or common name of such canal system and irrigation works is North Side Canal System, extending from the Milner Dam at Milner, Idaho, in a general northwesterly direction through the counties of Jerome and Gooding and into the County of Elmore;

That the tolls, assessments, and charges for maintaining and operating its irrigation works and conducting the business of such organization and meeting the obligations thereof and charge therefor for the period from April 1, 1935 and ending March 31, 1936, shall be the sum of One ($1.00) Dollar per acre or per share of stock for each acre of land whose owners or holders have contracted with such Company to furnish water on such land, regardless of whether such water is used or not, and that the

lands on the First Segregation of said project under the Hillsdale Irrigation District shall be entitled to a credit of Twenty Five Cents ($.25) per acre or share of stock on account of previous water purchases;

That the said tolls, assessments, and charges for said year shall be payable in one installment on the first day of April, 1935, and shall be in the gross amount of One ($1.00) Dollar per share of stock on the whole project (each share representing the water right to one acre), with the credit of Twenty Five Cents ($.25) per share, or a net amount of Seventy Five Cents ($.75) per share on the said First Segregation, under the Hillsdale Irrigation District, and notice is hereby given that on and after November 1, 1935, and prior to January 1, 1936, the said North Side Canal Company, Limited, will file and claim the benefit of a lien against any parcel of land to which any of said share are appurtenant and liable for, and upon which said tolls, assessments, and charges are then unpaid, as provided by said Chapter 19, as aforesaid. [50]

In Witness Whereof, The said corporation has caused this instrument to be executed by its Secretary, the 15th day of March, 1935.

NORTH SIDE CANAL COMPANY,
LIMITED.

[Seal] By HARVEY W. HURLEBAUS
Secretary.

State of Idaho,
County of Jerome.—ss.

On this 15th day of March, 1935, before me, Floyd O. Beddall, a Notary Public in and for said State, personally appeared Harvey W. Hurlebaus, known to me to be the Secretary of the Corporation that executed the foregoing instrument, and acknowledged that said corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal] FLOYD O. BEDDALL
Notary Public
Residing at Jerome, Idaho.

Reception No. 59353

State of Idaho
County of Jerome.—ss.

I hereby certify that this instrument was filed for record at the request of North Side Canal Co. by H. W. Hurlebaus at 21 minutes past 11 o'clock A. M., this 25 day of March 1935 in my office and duly recorded in Book 105 at Page 407.

CHARLOTTE ROBERSON
Ex-Officio Recorder.

By.....
Deputy.

Fees $1.20
Return to ..... [51]

DEFENDANT'S EXHIBIT 2.

NOTICE OF CLAIM OF LIEN FOR WATER CHARGES BY NORTH SIDE CANAL COMPANY, LIMITED, A CORPORATION, FOR THE FISCAL YEAR COMMENCING APRIL 1, 1935, AND ENDING MARCH 31, 1936.

Notice Is Hereby Given: That the North Side Canal Company, Limited, a corporation, hereinafter designated "Claimant", hereby claims the benefit of the lien provided in Chapter 138, Idaho Compiled Statutes, 1919, against the tracts, parcels and lots of land hereinafter described, upon which the tolls, assessments and charges have not been paid for the fiscal year commencing April 1, 1935, and ending March 31, 1936, and for such purpose states and declares as follows:

I.

That the name of the Claimant is the North Side Canal Company, Limited, a corporation organized, acting and existing under and by virtue of the laws of the State of Idaho, with principal place of business at Jerome, Jerome County, Idaho.

II.

That on the 25th day of March, 1935, this claimant filed in the office of the County Recorder of Jerome County, Idaho, the same being the county in which the lands hereinafter described lie, a statement in writing containing the name of such cor-

poration, the general or common name of such canal system or irrigation works, and a general description of the same for identification, the amount of tolls, assessments and charges for the purpose of maintaining and operating said irrigation works, and conducting the business of the corporation for the fiscal year commencing April 1, 1935, and ending March 31, 1936, which statement is recorded in said Recorder's office in Book 105, at Page 407.

III.

That claimant is operating works in the said County and State, which were constructed and are and were used during the said fiscal year commencing April 1, 1935, and ending March 31, 1936, for the purpose of furnishing water to and reclaiming a large tract of land in said County and State, granted, segregated and set apart by the United States to the State of Idaho, and to which title has passed from the United States to the State of Idaho under the provisions of the Act of Congress, commonly called the Carey Act, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes", approved August 18, 1894, and the amendments and supplements thereof, which include each, every and all of the several tracts of land hereinafter described, all of which were and are a part and parcel of the land contemplated to be irrigated as a part of said Carey Act Segregation. [52]

IV.

That the land hereinafter mentioned and each and all of the several tracts of land hereinafter described upon which this lien is claimed has as appurtenant thereto a water right sufficient for the irrigation and reclamation of such tract, such water right being represented by shares of the capital stock of the claimant corporation owned and held by the owner or holder of said land or for his use and benefit.

V.

That each and all of the said tracts of land are situated in Jerome County, Idaho.

VI.

That the general and common name of said canal system and irrigation works is the "North Side Canal System" and the same consists of a dam in the Snake River, known as the "Milner Dam," and a series of main and subordinate canals and laterals leading from said dam through the counties of Jerome and Gooding and into the county of Elmore, all in the State of Idaho, and to and through the several tracts of land hereinafter described; the said system running in a general Northwesterly direction and lying immediately north of Snake River and Hagerman Valley.

VII.

That this lien Claimant's demand accrued by reason of a resolution adopted by the Board of

Directors of the said corporation on or about the 25th day of February, 1935, by which resolution the said corporation equally and ratably levied a reasonable toll, assessment and charge for the purpose of maintaining and operating the said irrigation works and conducting the business of said corporation and meeting the obligations thereof, which toll, assessment and charge was based upon the number of shares of water rights held or owned by the owner of the land to which the sater right in said irrigation works were and are dedicated or appurtenant, regardless of whether the water is or was used by such owner or holder on or for his land; that the amount of said charge so levied was one dollar ($1.00) per acre (which is the same as one share of stock in said corporation) provided, however, that all lands and water rights on the First Segregation of said project are entitled to a credit of twenty-five cents (25¢) per share for water purchased, and that the net assessment on said lands and water rights is seventy-five (75¢) cents per share; that water for the use of all lands holding or having water rights, including the particular tracts and parcels upon which this lien is claimed as hereinafter set forth, was available during the year 1935.

VIII.

That there is hereinafter set forth a statement of this lien claimant's demand, after deducting all just credits and offsets on account of the levy of

the said toll, assessment and charge, together with that particular tract, parcel or lot of land to be charged, with the said lien and the name of the reputed owner, if known, of the particular tracts, parcels or [53] lots; that said toll, assessment and charge was, and is, reasonable and necessary for purposes aforesaid.

IX.

That the claimant now sets forth several names of the various owners or reputed owners, if known, of the several tracts, parcels and lots, upon which this lien is claimed, the description of the particular tracts, parcels, and lots, and the amount due thereon, which amounts set forth plus interest at the rate of six (6%) per cent per annum from the due date, are the amounts for which this lien is claimed, which amounts, plus interest, are due and payable on account of the matter aforesaid, from the owners and holders of the several tracts, parcels and lots of lands and water rights respectively thereon, after reducting all just credits and offsets; that the name of such owner or reputed owner is set forth first, followed by a description of the land and followed by the amount of the unpaid assessment, toll and charge on said tract, parcel or lot of land; that in the description of the said land in this statement this claimant has where the same can be done, followed the usual and customary manner of designating the description of such land by Government designation; that wherein, for ex-

ample, said statement and reference is to the "NE¼ NE¼ 35-8-16", the same means the "Northeast Quarter of the Northeast Quarter, of Section 35, Township 8 South, Range 16 East, Boise Meridian, State of Idaho", and other designations are intended to be similarly read; that is to say, that the first part of such refers to the legal subdivision of the section, the one following to the section number, the one following to the township, which is intended to be south, and the one following to the range number, intended to be east, and all referring to Boise Meridian, State of Idaho; that the names given are the owners or reputed owners of the several tracts or parcels of land to the best of the knowledge, information and belief of this claimant.

The owners, descriptions and amounts are (Note —Names of owners, description and amount) here set forth as Exhibit "A" hereto annexed, and by express reference thereto made a part hereof.

In Witness Whereof, the said corporation has caused this claim to be executed by its Secretary and seal of said corporation placed thereon this 28th day of December, 1935.

NORTH SIDE CANAL COMPANY, LTD.

[Seal] By HARVEY W. HURLEBAUS, Secretary.

State of Idaho,
County of Jerome.—ss.

Harvey W. Hurlebaus, being first duly sworn on oath says: That he is the duly elected, qualified and acting Secretary and Agent of the North Side Canal Company, Limited, the corporation [54] making and claiming the above lien and liens; that the above claim of liens is made by authority and resolution of the Board of Directors of said corporation; that affiant is acquainted with the facts set forth in said claim of lien, and knows them to be true of his own knowledge; that affiant believes the said claim and claims of lien or liens on account of the matter above set forth against each, every and all of the several tracts and parcels of land in said statement set forth to be just.

HARVEY W. HURLEBAUS

Subscribed and sworn to before me this 28th day of December, 1935.

[Seal] WAYNE A. BARCLAY
Notary Public [55]

DEFENDANT'S EXHIBIT 7.

In the District Court of the Eleventh Judicial District of the State of Idaho, In and for the County of Jerome.

Case No. 2294

Filed Dec. 24, 1937.

NORTH SIDE CANAL COMPANY, LIMITED, a corporation,

Plaintiff,

vs.

IDAHO FARMS COMPANY, a corporation, successor to TWIN FALLS NORTH SIDE INVESTMENT COMPANY, LIMITED, a corporation,

Defendant,

COMPLAINT

First Cause of Action

Comes now plaintiff and for its first cause of action against the above named defendant, avers and alleges:

I

That the plaintiff is now and at all of the times mentioned herein has been a corporation organized, acting and existing under and by virtue of the laws of the State of Idaho, and is now and during all said times has been a corporation operating irrigation works for the purpose of furnishing water to or reclaiming in whole or in part lands granted,

segregated or set apart by the United States to the State of Idaho, or settled under the provisions of the Act of Congress, commonly called the "Carey Act", entitled: "An Act making Appropriation for Sundry Civil Expenses of the Government for the Fiscal Year ending June 30th, 1895, and for other purposes", approved August 18th, 1894, and the amendments and supplements thereof together with other lands embraced in homestead and desert entries as provided by contract between the State of Idaho and Twin Falls North Side Land and Water Company, under date of April 15th, 1907, August 21st, 1907 and January 2nd, 1909, and the amendments and supplements thereto, and that during all of said time the control of said irrigation works has been and now is actually vested in those entitled to the use of the water from such irrigation works, for the irrigation of the lands to which the water therefrom is appurtenant and is commonly known as a "Carey Act operating company."

II

That the above named defendant, Idaho Farms Company, is a corporation acting and existing under and by virtue of the laws of the State of Delaware and that it has complied with the laws of the State of Idaho so as to entitled it to do and transact business within the State of Idaho and that it now is the successor of the Twin Falls North Side Investment Company, Limited, a corporation.

III

That the lands hereinafter described are all situated, lying and being in the County of Jerome, State of Idaho, and are now, and were, during all of said times, contained in a tract of land segregated or set apart by the United States to the State of Idaho, as provided in said Carey Act, and in other entries as provided in said State Contracts, and upon all of which lands water and water rights belonging and appertaining thereto are dedicated from and under the irrigation system controlled and operated by plaintiff. [56]

IV.

That the charges for the maintenance and operation of said system were duly made and levied by plaintiff for the year 1935 in the sum of $1.00 an acre upon all of the said land, and upon all alike lands within said irrigation system for the said year, payable as follows, to-wit: One dollar an acre on or before April 1st, 1935.

V.

That on or about the 25th day of March, 1935, plaintiff caused to be filed in the office of the County Recorder of Jerome County, Idaho, a statement and notice as required by Sections 41-1901 and 41-1902, Idaho Code Annotated, 1932 Edition, together with the amendments and supplements thereof, and that said notice was thereafter recorded in said Book 105 at Page 407 thereof.

VI.

That for the purpose of securing the payment of the assessment so levied, as aforesaid, plaintiff on the 30th day of December, 1935 filed for record in the office of the County Recorder of said County its claim of lien which was afterwards recorded in said office in Book 92 at Page 453 thereof; that the said claim of lien contained the name of plaintiff, the general or common name of the said canal system or irrigation works sufficient for identification thereof, and a statement of plaintiff's demand after deducting all just credits and off-sets, and a description of the tracts or parcels of land to be charged, with the name of the owner or reputed owner thereof, duly verified by an agent of plaintiff to the effect that affiant believed the same to be just.

VII.

That the description of the lands assessed, with the number of shares of capital stock of plaintiff thereto appurtenant, and the sums so assessed, charged and levied against said lands, paid thereon, and balance due, are as follows, to-wit:

Description	No. of Shares	Assessed	Paid	Balance Due
SW¼ of NE¼, 32-7-16	30	$30.00	None	$30.00
NW¼ of SW¼, 32-7-16	35	$35.00	"	$35.00
NE¼ of NW¼, 32-7-16	40	$40.00	"	$40.00
SE¼ of NW¼, 32-7-16	35	$35.00	"	$35.00
SW¼ of NW¼, 32-7-16	30	$30.00	"	$30.00
NW¼ of SE¼, 32-7-16	35	$35.00	"	$35.00
SE¼ of NW¼, 22-7-16	40	$40.00	"	$40.00
SW¼ of NE¼, 22-7-16	40	$40.00	"	$40.00
SW¼ of NW¼, 23-7-16	30	$30.00	"	$30.00
SW¼ of SW¼, 5-9-16	40	$40.00	"	$40.00
SE¼ of SW¼, 5-9-16	40	$40.00	"	$40.00
NW¼ of NW¼, 23-7-16	40	$40.00	"	$40.00
NE¼ of SE¼, 5-9-18	20	$20.00	"	$20.00
SW¼, 24-7-16	40	$40.00	"	$40.00
SW¼, 24-7-16	60	$60.00	"	$60.00
SE¼ of SW¼, 9-8-16	40	$40.00	"	$40.00
NW¼ of NE¼, 13-10-20	12	$ 9.00	"	$ 9.00
SE¼ of SE¼, 28-8-16	30	$30.00	"	$30.00
SE¼ of SW¼, 18-10-20	14.9	$11.18	"	$11.18
37.5 ac. East of N-10 Canal of NE¼ of SW¼, 28-8-16	37.5	$37.50	"	$37.50

[57]

That in the foregoing land descriptions, Northwest Quarter is abbreviated as "NW¼"; Southwest Quarter is abbreviated as "SW¼"; Northeast Quarter is abbreviated as "NE¼", and Southeast Quarter is abbreviated as "SE¼"; South Half is abbreviated as "S½"; the Section number is given first, followed by the Township number, which in all cases is Township South, and then followed by the Range number, which in all cases is Range East of the Boise Meridian; and that all of the said described real estate is within Jerome County, Idaho.

VIII.

That the said defendant has, or claims to have, some title, interest and claim in and to the above described real estate, but plaintiff avers that such interest or claim, if any, is subject to and subsequent to plaintiff's claim of lien as herein stated.

Second Cause of Action

For its second cause of action against the above named defendant, plaintiff alleges and avers:

I

Plaintiff re-alleges, re-iterates and adopts all of paragraphs one, two, three and eight of its first cause of action herein and makes the same and all thereof a part of this, its second cause of action, as fully and completely as though each of the allegations set forth in said paragraphs one, two, three and eight of its first cause of action were herein specifically set forth.

II.

That the charges for the maintenance and operation of said system for the year 1936 were duly made and levied by plaintiff for the said year of 1936 in the sum of one dollar and twenty-five cents an acre upon all of said land, and upon all like lands within said irrigation system for the said year, payable as follows, to-wit: one dollar and twenty-five cents an acre on or before April 1st, 1936.

III.

That on or about the 17th day of March, 1936, plaintiff caused to be filed in the office of the County Recorder of Jerome County, Idaho, a statement and notice as required by Sections 41-1901 and 41-1902, Idaho Code Annotated, 1932 Edition, together with the amendments and supplements thereof and that said notice was thereafter recorded in Book 110 at Page 88 thereof.

IV.

That for the purpose of securing the payment of the assessment so levied, as aforesaid, plaintiff on the 31st day of December, 1936, filed for record in the office of the County Recorder of said County its claim of lien which was afterwards recorded in said office in Book 92 at Page 484 thereof; that the said claim of lien contained the name of plaintiff, the general or common name of the said canal system or irrigation works sufficient for identification thereof, and a statement of plaintiff's demand after deducting all just credits and off-sets, and a description of the tracts or parcels of land to be charged, with the name of the owner or re- [58] puted owner thereof, duly verified by an agent of plaintiff to the effect that affiant believed the same to be just.

V.

That the description of the lands assessed, with the number of shares of capital stock of plaintiff thereto appurtenant, and the sums so assessed,

charged and levied against said lands, paid thereon, and balance due, are as follows, to-wit:

Description	No. of Shares	Assessed	Paid	Balance Due
4.8 ac. of NE¼ of SW¼ 3-8-17	4.8	$ 6.00	None	$ 6.00
SW¼ of NE¼, 32-7-16	30	$37.50	"	$37.50
NW¼ of SW¼, 32-7-16	35	$43.75	"	$43.75
NE¼ of NW¼, 32-7-16	40	$50.00	"	$50.00
SE¼ of NW¼, 32-7-16	35	$43.75	"	$43.75
SW¼ of NW¼, 32-7-16	30	$37.50	"	$37.50
NW¼ of SE¼, 32-7-16	35	$43.75	"	$43.75
SE¼ of NW¼, 22-7-16	40	$50.00	"	$50.00
SW¼ of NE¼, 22-7-16	40	$50.00	"	$50.00
SW¼ of NW¼, 23-7-16	30	$37.50	"	$37.50
SW¼ of SW¼, 5-9-16	40	$50.00	"	$50.00
SE¼ of SW¼, 5-9-16	40	$50.00	"	$50.00
SE¼ of NW¼, 9-9-16	40	$50.00	"	$50.00
SW¼ of NW¼, 9-9-16	40	$50.00	"	$50.00
NW¼ of NW¼, 23-7-16	40	$50.00	"	$50.00
SE¼ of SW¼, 22-7-16	40	$50.00	"	$50.00
NW¼ of SE¼, 22-7-16	30	$37.50	"	$37.50
SE¼ of NE¼, 5-9-18	20	$25.00	"	$25.00
SW¼, 24-7-16	40	$50.00	"	$50.00
SW¼, 24-7-16	60	$75.00	"	$75.00
SE¼ of SW¼, 9-8-16	40	$50.00	"	$50.00
NW¼ of NE¼, 13-10-20	12	$15.00	"	$15.00
30 ac. of SE¼ of SE¼, 28-8-16	30	$37.50	"	$37.50
SE¼ of SW¼, 18-10-20	14.9	$18.62	"	$18.62
37.5 ac. East of N-10 Canal of NE¼ of SW¼, 28-8-16	37.5	$46.87	"	$46.87

Wherefore, Plaintiff demands judgment against the lands described in each of said causes of action herein in the amounts due, as set forth in each of said causes of action, with interest thereon at the rate of six per cent per annum from the date that the same became due as stated in the foregoing

complaint against each separate tract of land as the balance due thereon is indicated.

That plaintiff's liens be established and foreclosed on said land as herein described, together with the water rights thereon, as provided by law, and that the defendant and all persons claiming under it may be foreclosed of all right, claim or equity of redemption or other interest in and to said described real estate, or any part thereof; that the said lands to be sold and the proceeds applied to the payment of the costs and expenses of this action and the amount found due to the plaintiff, and that plaintiff have such other and further relief as in equity may seem just, and its costs.

WAYNE A. BARCLAY,
Attorney for Plaintiff,
Residing at Jerome, Idaho.

[Endorsed]: Defendant's Exhibit A Filed Dec. 24, 1937 [state court]

[Duly Verified]

[Endorsed]: Filed March 7, 1938. [59]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on to be heard at this term and was argued by counsel; and thereupon, after consideration thereof, the court being fully advised, now makes the following findings of fact and conclusions of law:

I.

That many years ago this plaintiff, then known as Twin Falls North Side Land & Water Company, a corporation duly organized and existing under the laws of Delaware, and then and ever since duly qualified and authorized to do business in Idaho (being hereinafter referred to as the construction Company), entered into three certain contracts in writing with the State of Idaho, said contracts being dated, respectively, April 15, 1907, August 21, 1907, and January 2, 1909, under the provisions of an Act of Congress of August 18, 1894, and acts amendatory and supplemental thereof, commonly known as the "Carey Act", and the laws of Idaho applicable to said Carey Act, and accepting the benefits thereof, whereby said construction company agreed to construct certain irrigation works for the irrigation of about 200,000 acres of land in the then counties of Lincoln and Elmore, State of Idaho (now Jerome, Gooding, and Elmore Counties), said land having been theretofore segregated to the State of [60] Idaho under said Carey Act; and moreover agreed to sell to settlers upon said lands water rights or shares in said irrigation system so to be constructed; that said contracts are sometimes hereinafter referred to as the "state contracts"; that said contracts were by their terms to be construed together with, and each related to, the same irrigation enterprise, and except as to the description of the lands to be reclaimed there-

under and other minor matters were substantially identical in form and substance.

II.

That the plan and method of procedure for the construction of said irrigation system and for selling water rights therein, and for operating the same after completion, which was provided for in the said state contracts, and which has been followed on said irrigation project is and was as follows:

That a corporation should be and was formed known as the North Side Canal Company, Limited (which is the defenedant, and is hereinafter for brevity called the canal company), with a capital stock of 200,000 shares, which amount was intended to represent one share for each acre of land to be irrigated from said system; that initially the entire capital stock of said canal company should be and was delivered to the construction company in consideration of the building by it of said irrigation works and system, but which stock was delivered to it for sale to settlers or landowners under said irrigation system; that each original purchaser of the water right for a specific tract of land to be reclaimed should and did enter into a water contract with the construction company; that in each of said water contracts the construction company agreed to [61] and did sell to the landowner executing the same one share of the capital stock of said canal

company as and for the water right for each acre of land to be irrigated; that it was further provided in said contracts that said irrigation system, together with all water appropriations, rights, franchises, and privileges, should after its completion be, and it has been, transferred to said canal company, it being the purpose and intent of said state contracts that said canal company would hold said irrigation system and all water appropriations, rights, franchises, and privileges, belonging thereto or appurtenant to the land served thereby, for and on behalf of its stockholders, and that said system with its water appropriations and privileges would after completion be transferred to said canal company to be owned, held, managed, and operated by the latter; that the water rights under said project which have been sold are represented by shares of stock in the said canal company; that each purchaser of water rights purchased and acquired as such water right one share of the capital stock of said canal company for each acre of his land, and there was issued to each purchaser of a water right in said system one share of the stock of said canal company as the water right for each acre of the irrigable land owned by such purchaser or entered by him under the Carey Act; and the said defendant canal company is composed of and represents the owners of water rights or holders of water contracts.

III.

That pursuant to said state contracts said construction company, between the years 1907 and 1920, constructed and completed said irrigation project for the reclamation of 170,000 acres of land lying in said Jerome, [62] Gooding, and Elmore Counties, and contracted with landowners for the sale of approximately 170,000 shares of water rights therein; in the year 1921, upon the completion of said irrigation system, it transferred, pursuant to said state contracts, the ownership, management, operation, and control of said irrigation works and system to said defendant canal company; and the latter is now, and for many years past has been, managing, operating, and controlling the same as the owner thereof, but for the benefit of and in the interest of its stockholders who are the owners of water rights in said irrigation system.

IV.

That on or about the 1st day of November, 1907 said construction company, for the purpose of securing funds with which to build and construct the irrigation system and works described in said state contracts and for other purposes described in the trust deed, executed to the American Trust & Savings Bank, as trustee, its certain mortgage or deed of trust by which it mortgaged, pledged, and conveyed to said trustee all its interest in the irrigation works, water rights, and other rights and franchises in connection therewith, and such water contracts

as were thereafter assigned to and deposited with the trustee, and all moneys due or to become due thereunder, to secure an issue of bonds as in said mortgage or deed of trust provided, in the authorized amount of $5,000,000.00, of which authorized issue bonds in the aggregate principal amount in excess of $3,700,000.00 were issued and sold by said construction company to raise funds with which to construct irrigation works, and which said bonds were sold to numerous persons and institutions throughout the United States; and to further secure said bonds, and in compliance with said deed of trust, said construction company at var- [63] ious times pledged and assigned to said American Trust & Savings Bank, as trustee for said bondholders, and to its successors in the said trust, its interest in substantially all the said various individual water purchase contracts from time to time made and entered into with settlers. That thereafter, the Continental & Commercial Trust & Savings Bank, an Illinois corporation, by merger and change of corporate name, succeeded to all the rights, duties, and obligations of said American Trust & Savings Bank, as trustee for said bondholders under said mortgage or deed of trust and likewise succeeded to said assigned contracts deposited in pledge, as aforesaid, with its predecessor trustee. That the contracts for the sale of water rights made by the construction company with the owners of land under said irrigation system and deposited, as aforesaid, with the trustee for bond-

holders to secure the payment of the bonds were alike in substance, tenor, and effect, except as to immaterial particulars; that a copy of one such contract is attached to plaintiff's complaint herein as "Exhibit A", and made a part thereof; and all other water contracts so entered into and deposited with said trustee were of similar tenor and effect.

That on or about December 1, 1927, said Continental & Commercial Trust & Savings Bank, successor trustee for the bondholders, as aforesaid, merged and consolidated with Continental & Commercial National Bank of Chicago, Illinois, under the name of Continental National Savings Bank & Trust Company of Chicago; and by virtue of such merger and consolidation said Continental National Bank & Trust Company of Chicago became, and thereafter continued to be, successor trustee [64] for the bondholders of said bonds under said mortgage or deed of trust, and had with respect to the water purchase contracts deposited as security for said bonds, and with respect to all other matters arising under said mortgage or deed of trust, all duties, rights, powers, and privileges of the original trustee.

V.

That in the year 1913, after several million dollars had been expended in the construction of said project, and while the same was uncompleted and unfinished, and before water had been made fully available for the irrigation of all the lands within

said project, the construction company became insolvent and failed. Thereupon, the corporations and individuals owning its outstanding bonds appointed a bondholders' protective committee which committee, thereunto duly authorized by said bondholders, thereafter advanced on behalf of said bondholders approximately two million dollars which were used in the subsequent construction and completion of said irrigation works under said state contracts; and said bondholders' protective committee, acting in conjunction with said trustee for the bondholders, then took over, for the sole use and benefit of the bondholders, the management and control of the construction company and all of its property and business; and the latter, at all times from and after the year 1913, has been operated and carried on by said bondholders; and said construction company has held and owned such property for the use and benefit of said bondholders substantially all of which property was subject to the lien of said mortgage or deed of trust and the bonds thereby se- [65] cured, until the release of said mortgage or deed of trust under the circumstances hereinafter recited.

VI.

That subsequent to the execution of the aforesaid mortgage or deed of trust by the construction company, it deposited with and pledged and assigned to the said trustee for the holders of the bonds thereby secured, substantially all of the contracts

entered into by the construction company, as aforesaid, for the sale of water rights or shares in said irrigation system, which said water right contracts, to the extent of the several amounts owing and unpaid thereon, respectively constituted a lien upon the lands and shares of stock in each severally described, all as provided by the laws of the United States, commonly known as the Carey Act, by the laws of the State of Idaho (and particularly the provisions of said laws of Idaho now embodied in Section 41-1726, Idaho Code Annotated, 1932, formerly Section 3019, Idaho Compiled Statutes) and by said state contracts, and each of them; that said trustee from time to time made collections of installments of principal and interest falling due on some of said water contracts until the same were fully paid, and thereupon, in the manner provided in said mortgage or deed of trust, said trustee released from the several liens imposed by such respective water contracts so paid up in full, the lands and water rights severally covered thereby; that upon certain other of said water contracts deposited with said trustee, as aforesaid, payments of the installments of the purchase price, with the interest thereon, have from time to time been made by the purchasers of such contracts, without such default occurring as necessitated their foreclosure, and a considerable number of such contracts are in force and [66] effect, with installments, however, still unpaid thereon but which are being collected,

and which last mentioned contracts are now owned and held by plaintiff.

VII.

That in the case of certain of said water contracts deposited, as aforesaid, with the trustee under said mortgage or deed of trust, and also in the case of a small number of such water contracts not so deposited, it was necessary, upon default being made in the payments of principal and interest falling due under said several contracts, for said trustee (either in its own name or in the name of an agent or agency, as hereinafter more particularly set out) to conduct proceedings for the enforcement and foreclosure of the respective liens imposed thereby; and by reason of such proceedings and in the enforcement and foreclosure of said water contracts, said trustee acquired, in the place and stead of such water contracts originally deposited with it, certain real property situated in Jerome, Gooding, and Elmore Counties, Idaho, together with the respective shares of stock purchased under the aforesaid water contracts and evidencing a water right for the respective parcels of land intended to be irrigated thereby; that attached hereto as "Exhibit I", and made a part hereof, is a list of such lands, showing the description of the said several tracts of the same and other data as more particularly set out in paragraph XI hereof.

VIII.

That in the year 1913, at the time plaintiff (then known as Twin Falls North Side Land & Water Company) became insolvent, its stockholders owned and were operating a subsidiary corporation, organized under the laws of the [67] State of Idaho, known as the Twin Falls North Side Investment Company, Limited (hereinafter for brevity sometimes called the investment company); that in the year 1913, to avoid the cost and expense of foreclosure of the trust deed aforesaid, securing said bond issue, the stockholders of said construction company turned over to said bondholders' protective committee a majority of the capital stock of said construction company and all of the capital stock of said investment company; that thereafter all such outstanding capital stock of said investment company was at all times owned and held by said bondholders' protective committee or the members thereof for the use and benefit of said bondholders, and thereafter said investment company was at all times operated by said bondholders' protective committee as a land holding company, to take over upon foreclosure and to hold until resale and to resell to other settlers under said irrigation project lands and water rights acquired for the benefit of said bondholders through foreclosure of the Carey Act water contracts or by quitclaim deed in lieu of foreclosure; that is to say, said investment company has been at all times since 1913 conducted

and operated solely as a convenient agency and instrument of the bondholders to realize upon the mortgaged and pledged assets securing said bonds.

In some instances, the aforesaid suits for the foreclosure of said water contracts above referred to were conducted in the name of the construction company; in some instances such proceedings were conducted in the name of said trustee for the bondholders; and in some instances of [68] foreclosure upon said Carey Act water contracts, the property involved therein was bid in at the judicial sales resulting from such foreclosure in the name of the investment company but on behalf of and in the interest of said bondholders; and in other instances the property involved was bid in at said judicial sales by the trustee for the bondholders, and in other instances by said construction company, likewise on behalf of and in the interest of the bondholders; and in certain instances, in lieu of the foreclosure of said Carey Act water contracts, quitclaim deeds from the owners of the property secured by the terms of the water contracts were taken by said investment company or by said construction company, each acting in the interest of said bondholders, said quitclaim deeds being taken either during the progress of foreclosure proceedings or to avoid foreclosure proceedings upon certain of said Carey Act water contracts evidencing the sale of water rights.

That all the lands described in "Exhibit I" hereto attached, with the water rights or shares of

stock respectively appurtenant thereto, were acquired in the enforcement of said Carey Act contracts.

IX.

That prior to December 11, 1936 all the capital stock of the construction company had been assigned and delivered to the said bondholders' protective committee, except 200 shares thereof, which and the owners of which could not be found or located; that the capital stock of said construction company so assigned and delivered to the said bondholders' protective committee constituted upwards of 95% of the total authorized outstanding capital stock of said con- [69] struction company; that thereafter and just prior to December 11, 1936, the then trustee for said bondholders conveyed to the construction company all the lands, water right contracts, and other property then held by it as such trustee, said conveyance being part of a plan and method by which all of the assets secured by said mortgage or deed of trust covering said irrigation project were to be and were transferred to the said bondholders; that further in pursuance of said plan, said trustee shortly prior to December 11, 1936 released of record said mortgage or deed of trust; that further in pursuance of and as a convenient method of vesting in said bondholders beneficial ownership to all said lands, water right contracts, and other assets of every kind, character, and description, the said investment company was,

by written agreement of merger of that date, merged into the construction company, which agreement of merger was duly authorized, executed, accepted, and filed in accordance with the laws of the State of Delaware and of the State of Idaho, it being provided by the terms of said merger agreement that the investment company ceased to exist as a corporate entity; and that the construction company constituted the surviving corporation, the name of such surviving corporation being by the terms of said merger agreement and steps taken in pursuance thereof changed to Idaho Farms Company, which is the plaintiff herein; that as part of said merger, all of the capital stock of the investment company was cancelled and retired, as was also all of the outstanding capital stock of the Twin Falls North Side Land & Water Company (which was the construction company prior to said merger) except only the said 200 shares which and the owners of which could not [70] be ascertained or located; that under the terms of said merger agreement a new stock issue of 37,601 shares in said Idaho Farms Company, of the par value of $45.00 each, was authorized to be issued and was issued pro rata among the bondholders in exchange for said bonds, so that each of said bondholders should and did receive one share of the new stock of said Idaho Farms Company for each $100.00 original principal value of the bonds held by him; that by reason of said transfer and con-

veyance from said trustee to the construction company, and by reason of said merger, and in accordance with the provisions of the statutes of the State of Idaho and of the State of Delaware relating to merger of corporations, the plaintiff herein, that is to say, the original surviving construction company, became vested with all the rights, titles, privileges, and franchises of every kind and character in and to the lands and water rights listed and described in "Exhibit I" hereto attached, the former bondholders of the said construction company being, by reason of the stock distribution above set forth, the beneficiaries thereof.

That plaintiff, with respect to all the property listed and described in "Exhibit I", is the agency and instrumentality of said bondholders for realizing upon the assets mortgaged and pledged for their security in connection with moneys advanced for the construction of said irrigation system, and is entitled to all the rights of said original construction company and of said successive trustees for the bondholders growing out of said state contracts, and each of them; that plaintiff is now the owner, in possession, and entitled to possession of all the property listed and described [71] in said "Exhibit I" hereto attached, and each and every parcel thereof.

X.

That in all the said cases of foreclosure of water contracts or proceedings in lieu of such foreclosure whereby the properties listed and described in "Exhibit I" were acquired and obtained, only a small

part of the original purchase price of the water rights secured by such water contracts had been paid by the purchasers prior to such foreclosure; that all the lands listed and described in "Exhibit I" are situated within what are known, respectively, as the second segregation and the third segregation of said irrigation project, all of said listed lands being in the second segregation except those lands listed in "Exhibit I" which are located in Township 6 South, Range 13 East Boise Meridian, and the lands in Sections 18, 19, 20, and 30, Township 6 South, Range 14 East Boise Meridian, which last mentioned lands are in the third segregation.

That by the terms of said state contract dated August 21, 1907, which related to the second segregation of said irrigation project, the construction company was authorized to sell water rights for $35.00 per share, that amount being by the terms of said state contract deemed necessary by the State of Idaho in order that plaintiff might be reimbursed for the costs and expenses of reclamation of said land and interest thereon, as contemplated by the applicable federal and state laws.

That by the terms of said state contract dated January 2, 1909, which related to the third segregation of said irrigation project, the construction company was authorized to sell water rights for $45.00 per share, that amount [72] being by the terms of said state contract deemed necessary by the State of Idaho in order that plaintiff might be reimbursed for the costs and expenses of reclamation of said

land and interest thereon, as contemplated by the applicable federal and state laws.

That since the acquisition of the properties listed and described in "Exhibit I" by foreclosure or quitclaim deed in lieu of foreclosure as aforesaid, plaintiff and its respective grantors have paid out for taxes the sums of money shown as such on "Exhibit I" hereto attached in order to protect the priority of its lien and title to said properties.

That the holders of the bonds outstanding in 1913 whose funds were used in the construction of said irrigation works and project have been by the proceeds of sales of water rights and collections thereon heretofore reimbursed to the extent of only 55% (without any interest since 1913) of the actual principal sums advanced by them and expend in the construction of said irrigation project.

XI.

In the list, "Exhibit I", hereto attached is shown the legal description of each of the tracts of land now owned by plaintiff which was acquired by foreclosure or quitclaim deed in lieu of foreclosure of a Carey Act water contract in the manner hereinbefore set out. In the column "Legal Description" abbreviations are used: For example, the description "NW¼NW¼ 9-9-17" means "Northwest quarter of the Northwest quarter of Section 9, Township 9 South, Range 17 East Boise Meridian"; in each case, the number following the subdivision being the section number according to the government

survey, the next number being the number of the township south of the Boise, Idaho Base Line, and the next number indicating the [73] range east of the Boise Meridian. Said list, "Exhibit I", shows by appropriate designation the agent or agency of the bondholders by whom the property was acquired through foreclosure or quitclaim deed in lieu of foreclosure. The column "Contract No." shows the number of the Carey Act water contract by which the appurtenant water right was originally sold to the settler; the column headed "No. Shares" shows the number of shares of capital stock of the defendant company appurtenant to such land as a water right; the column headed "Cert. No." shows the number of the certificate of the capital stock which evidences such water right; the column "Date of Deed" shows in abbreviated form the date when by foreclosure or quitclaim deed in lieu of foreclosure of the Carey Act contract each several tract of land was acquired; the column "Amount Due at Date of Deed" shows the amount due and owing on the settler's water contract (including interest and costs of foreclosure but not attorneys' fees) at the time the property was acquired by the bondholders by foreclosure of the settler's Carey Act contract involved; or in cases where the property was acquired by quitclaim deed in lieu of foreclosure, then said column shows the amount due and owing on the settler's water contract (including interest) at the time it was so acquired, and the column "Taxes Paid" shows with respect to each tract of land the

state and county taxes paid on behalf of the bondholders by or through one or more of their several agencies subsequent to the time said property was so acquired by foreclosure or by quitclaim deed in lieu of foreclosure.

XII.

That plaintiff is now and at all times mentioned herein was a corporation duly organized and existing under [74] and by virtue of the laws of the State of Delaware and was when its complaint was filed in this suit and now is a citizen and resident of the State of Delaware; that the defendant is now and at all the times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Idaho; that at the time plaintiff's complaint was filed herein said defendant was and it is now a citizen and resident of the State of Idaho and was at all times after its organization and is now a "Carey Act Operating Company" formed in accordance with the provisions of the said state contracts between the State of Idaho and the Twin Falls North Side Land & Water Company dated, respectively, April 15, 1907, August 21, 1907, and January 2, 1909, for the purpose of taking over and operating after completion the irrigation works to be constructed under said state contracts; that during all of the times herein mentioned subsequent to the year 1921 the control of said defendant and of said irrigation works has been and now is actually vested in and exercised by those entitled to the use of water from such irriga-

tion works; that the lands comprising the irrigation project of defendant are located in the Counties of Jerome, Gooding, and Elmore, State of Idaho.

XIII.

That for the year 1935, an assessment for the maintenance and operation of defendant's irrigation system was duly made and levied by defendant at the rate of $1.00 per share upon all its capital stock appurtenant to land under its said irrigation system, said assessment being payable on or before April 1, 1935. [75]

That on or about the 25th day of March, 1935 defendant caused to be filed in the office of the County Recorder of Jerome County, Idaho a statement and notice of said assessment as required in Sections 41-1901 and 41-1902, Idaho Code Annotated, 1932 Edition, together with the amendments and supplements thereof, and that said notice was on said date recorded in Book 105 at page 407 thereof.

That a similar notice was on or about the same date filed for record and recorded in the office of the County Recorder of Gooding County, Idaho.

That for the purpose of securing the payment of the assessments so levied for the year 1935, defendant on the 30th day of December, 1935 filed for record in the office of the County Recorder of Jerome County, Idaho its claim of lien for the amount of said assessment upon all delinquent stock together with the land to which such delinquent stock was appurtenant, which claim of lien was

afterward recorded in said office in Book 92 at page 453 thereof. That said claim of lien was in all respects in conformity with and as required by Section 41-1903, Idaho Code Annotated; that said claim of lien described those lands of plaintiff listed and described in "Exhibit I" hereto attached which are situated in Jerome County, Idaho, and claimed a lien thereon and upon the appurtenant water stock in the amount of $1.00 per share of such appurtenant water stock, together with interest thereon at the rate of 6% per annum from April 1, 1935.

That a similar claim of lien was on the same date duly filed for record and recorded in the office of the County Recorder of Gooding County, Idaho; that said claim of lien described those lands of plaintiff listed and described in [76] "Exhibit I" hereto attached which are situated in Gooding County, Idaho, and claimed a lien thereon and upon the appurtenant water stock in the amount of $1.00 per share of such appurtenant water stock, together with interest thereon at the rate of 6% per annum from April 1, 1935.

XIV.

That for the year 1936, an assessment for the maintenance and operation of defendant's irrigation system was duly made and levied by defendant at the rate of $1.25 per share upon all its capital stock appurtenant to land under its said irrigation system, said assessment being payable on or before April 1, 1936.

That on or about the 17th day of March, 1936 defendant caused to be filed in the office of the County Recorder of Jerome County, Idaho a statement and notice of said assessment as required in Sections 41-1901 and 41-1902, Idaho Code Annotated, 1932 Edition, together with the amendments and supplements thereof, and that said notice was on said date recorded in Book 110 at page 88 thereof.

That a similar notice was on or about the same date filed for record and recorded in the office of the County Recorder of Gooding County, Idaho.

That for the purpose of securing the payment of the assessments so levied for the year 1936, defendant on the 31st day of December, 1936 filed for record in the office of the County Recorder of Jerome County, Idaho its claim of lien for the amount of said assessment upon all delinquent stock together with the land to which such delinquent stock was appurtenant, which claim of lien was afterward recorded in said office in Book 92 at page 484 thereof. That said claim of [77] lien was in all respects in conformity with and as required by Section 41-1903, Idaho Code Annotated; that said claim of lien described those lands of plaintiff listed and described in "Exhibit I" hereto attached which are situated in Jerome County, Idaho, and claim a lien thereon and upon the appurtenant water stock in the amount of $1.25 per share of such appurtenant water stock, together with interest thereon at the rate of 6% per annum from April 1, 1936.

That a similar claim of lien was on the same date duly filed for record and recorded in the office of the County Recorder of Gooding County, Idaho; that said claim of lien described those lands of plaintiff listed and described in "Exhibit I" hereto attached which are situated in Gooding County, Idaho, and claimed a lien thereon and upon the appurtenant water stock in the amount of $1.25 per share of such appurtenant water stock, together with interest thereon at the rate of 6% per annum from April 1, 1936.

XV.

That for the year 1937, an assessment for the maintenance and operation of defendant's irrigation system was duly made and levied by defendant at the rate of $1.50 per share upon all its capital stock appurtenant to land under its said irrigation system, said assessment being payable on or before April 1, 1937.

That on or about the 24th day of March, 1937 defendant caused to be filed in the office of the County Recorder of Jerome County, Idaho a statement and notice of said assessment as required in Sections 41-1901 and 41-1902, Idaho Code Annotated, 1932 Edition, together with the amendments and supplements thereof, and that said notice was on said date recorded in Book 110 at page 260 thereof. [78]

That a similar notice was on or about the same date filed for record and recorded in the office of the County Recorder of Gooding County, Idaho.

That for the purpose of securing the payment of the assessments so levied for the year 1937, defendant on the 29th day of December, 1937 filed for record in the office of the County Recorder of Jerome County, Idaho its claim of lien for the amount of said assessment upon all delinquent stock together with the land to which such delinquent stock was appurtenant, which claim of lien was afterward recorded in said office in Book 92 at page 526 thereof. That said claim of lien was in all respects in conformity with and as required by Section 41-1903, Idaho Code Annotated; that said claim of lien described those lands of plaintiff listed and described in "Exhibit I" hereto attached which are situated in Jerome County, Idaho, and claimed a lien thereon and upon the appurtenant water stock in the amount of $1.50 per share of such appurtenant water stock, together with interest thereon at the rate of 6% per annum from April 1, 1937.

That a similar claim of lien was on the same date duly filed for record and recorded in the office of the County Recorder of Gooding County, Idaho; that said claim of lien described those lands of plaintiff listed and described in "Exhibit I" hereto attached which are situated in Gooding County, Idaho, and claimed a lien thereon and upon the appurtenant water stock in the amount of $1.50 per share of such appurtenant water stock, together with interest thereon at the rate of 6% per annum from April 1, 1937. [79]

XVI.

No evidence was admitted or received by the court tending to show that any proceedings were commenced by defendant in a proper court to enforce the aforesaid liens claimed by it for said assessments for the years 1935, 1936, or 1937, or any of said liens, against any of the property of plaintiff listed and described in "Exhibit I", and it is, therefore, hereby found and decided that no such proceedings in a proper court have been begun; and that more than two years have elapsed since the filing of the statement or claim of lien for the year 1935 as mentioned in Section 41-1903, Idaho Code Annotated.

XVII.

That prior to the commencement of this suit the defendant herein brought in the District Court of the Eleventh Judicial District of the State of Idaho, in and for the County of Jerome, six civil cases against plaintiff herein and its predecessors in interest for the purpose of foreclosing its liens for the respective annual assessments for maintenance and operation for the years 1932 to 1934, inclusive.

The questions, controversies, and issues raised in this suit are not the same or identical questions, controversies, and issues raised in said suits, or any of them, pending in said state district courts, or either of them; that the lien claimed by the defendant herein for maintenance and operation for each year depends for its validity (among other things) upon the timeliness, regularity, and propriety of proceed-

ings done and taken by defendant at wholly different times in order to perfect and enforce the same, in accordance with the requirements of Chapter 19, Title 41, Idaho Code Annotated; and the subject matter of each of the suits pending [80] in said state courts referred to in this paragraph is wholly different and distinct from the subject matter of this suit.

XVIII.

Certain improvements have been made on the defendant's irrigation system since the defendant acquired it which are outside the ordinary expense of delivery of water and maintenance of the system. No evidence appears showing the amount of such improvements done in the aggregate during the 3-year period (1935 to 1937, inclusive) involved in this suit. The evidence shows that during a period extending over approximately ten years the defendant has been engaged in making some improvements in the system and in the year 1935 it acquired 20,000 acre feet of additional capacity in the American Falls Reservoir.

The lands of plaintiff here in controversy were not irrigated and received no water from the system during any of the years since the date of their acquisition by foreclosure or quitclaim deed in lieu of foreclosure as shown on "Exhibit I" hereto and were not irrigated and received no water during any of the years for which liens for maintenance assessments are herein claimed by defendant. The de-

fendant and its stockholders (other than plaintiff) have continuously for many years used the water appurtenant to plaintiff's lands upon lands of the project belonging to such other stockholders, deriving benefit therefrom growing out of the status of plaintiff's property and this benefit, together with the large amount of assessments paid by plaintiff and its predecessors in interest in previous years constitute advantages to defendant far in excess of any equitable benefits conferred upon plaintiff through expenditures made by defendant in the improvement of the irrigation system and water supply. [81]

XIX.

The annual assessment levied by defendant upon the lands described and listed in "Exhibit I" hereto attached were regularly paid up to and including the year 1931 under the following circumstances:

After the sale to settlers of the water rights for said land under the respective settlers' water contracts, such annual assessments as had been paid were paid by such settlers up to the time when by foreclosure of such contracts or by quitclaim deed in lieu of foreclosure plaintiff or its predecessors in interest acquired the property; and thereafter up to and including the year 1931 plaintiff (or such other agency of the bondholders as acquired the property upon foreclosure or quitclaim deed in lieu thereof) paid such assessments amounting in the aggregate to upwards of $100,000.00; that no such assessments upon the property listed in "Exhibit

I'' were paid by anyone whomsoever for any year subsequent to 1931.

That from about the year 1913 R. E. Shepherd, now president of plaintiff, was an employee and local representative of the bondholders' committee hereinabove referred to but that neither said bondholders' committee nor its said local representative, R. E. Shepherd, was in charge of said irrigation system or of the distribution of water therefrom after the year 1921; that said R. E. Shepherd was also manager of said Twin Falls North Side Land & Water Company from about the year 1913 to December, 1936, and was during said period also manager of the investment company; that said R. E. Shepherd was also president of defendant from January 2, 1917 until about May 1, 1920 and was manager of defendant from on [82] or about September 20, 1921 until on or about March 31,1937.

XX.

That in connection with the assessments levied by defendant for the years 1935 to 1937, inclusive, and for some years prior thereto, said R. E. Shepherd as manager of the defendant assisted in preparing the annual budget of defendant's receipts and expenses and assisted in determining the amount of money required for the carrying on of defendant's business; that he was present during various meetings of the board of directors of defendant company during which said respective annual budgets and the assessments for said years to meet the estimated ex-

penditures shown in the budget were considered and determined; that said R. E. Shepherd advised and recommended such betterments and improvements as were made upon said irrigation system and the purchase or leasing of additional water rights and made no objection to the manner in which defendant's business was conducted or to the amount of assessments levied; that in all of such matters said R. E. Shepherd was acting as an agent and officer of defendant and on its behalf and not as agent or officer or on behalf of plaintiff or the said bondholders or any of their said agencies; that none of the foregoing facts nor any acts or conduct of said R. E. Shepherd constitute any estoppel against plaintiff's claims in this suit; that since 1931 the plaintiff has paid no maintenance assessments upon the property and no water was delivered or used upon the lands involved; that defendant was required under the law to spread the assessments ratably over all the lands of the project regardless of the contention of plaintiff and until its liability for such assessments was ultimately determined; that both the [83] plaintiff and the defendant had equal opportunity of ascertaining the facts and the law; that there was no false representation or concealment of material facts on the part of plaintiff or its predecessors; that the payment of the assessments by plaintiff and its predecessors up to and including the year 1931 did not constitute any obligation to continue such payments and that defend-

ant did not by reason of any action of plaintiff alter its position to its disadvantage.

XXI.

That the water rights sold and made appurtenant to the lands described in "Exhibit I" hereto attached were not in excess of the water which said construction company made available for said irrigation project and not in excess of the amount which said construction company should and ought to have sold under the said state contracts; nor because of any wrongful acts of the construction company was a shortage of water created upon the irrigation project; nor did the other settlers and stockholders of the company suffer or sustain losses by reason of such shortage; nor has defendant been compelled by reason of any wrongful acts of said construction company to purchase storage or other water; that water sold for use upon the lands described in "Exhibit I" has not been used upon said lands for more than five years prior to the commencement of this action; the evidence shows that the water appurtenant to plaintiff's said lands has all times been used by defendant upon lands owned by other stockholders under its system to whom defendant delivered such water. The water right appurtenant to plaintiff's lands is but a part of the entire water right appropriated by the construction company for use on the entire project. The evidence is lacking in proof of any intention of plaintiff to abandon its water right and there has been no [84] abandonment

or forfeiture through non-user. The relationship of the parties hereto were of a fiduciary nature and the defendant cannot properly urge that the water rights in question have passed to it.

From the facts found as above, conclusions of law are reached as follows:

I.

That under the pleadings in this case this court has the power and jurisdiction to determine the validity and priority of the respective claims and liens of the respective parties in and to the property here involved.

II.

The present action should not be abated until other actions pending in other courts involving different assessments levied by defendant for prior years are determined in such other court or courts.

III.

That the lien claimed by defendant by reason of its assessment for maintenance and operation for the year 1935 no longer binds in any respect any of plaintiff's property listed and described in "Exhibit I" hereto attached, no evidence having been presented herein that proceedings were commenced in a proper court to enforce such lien within the period prescribed by Section 41-1905, Idaho Code Annotated; but if said lien were at this time in any respect binding upon said property or any interest of plaintiff therein, it would be binding to no

greater extent than its liens for the years 1936 and 1937 are binding upon certain excess proceeds from the sale thereof, as specifically defined in paragraph VI of these conclusions of law. [85]

IV.

That all the properties of plaintiff described in "Exhibit I" hereto attached have been during the year 1935 and years subsequent thereto and are now exempt from the assessment liens of the defendant company; that plaintiff has the right to sell and keep sold all of said lands and water stock (whether the water stock appurtenant to each parcel of land so listed is sold with the land or is sold separately) free and clear of any claim of defendant for maintenance liens for the years 1935 and subsequent.

That such exemption from defendant's said maintenance liens will terminate as to any specific tract or parcel of land and the water stock appurtenant thereto listed in "Exhibit I" if, when, and as soon as plaintiff has received upon sale thereof the sum shown opposite the description thereof under the column "Exhibit I" headed "Amount Due at Date of Deed" plus the further sum paid out by plaintiff for taxes thereon which further sum is also shown as to each tract under that column in "Exhibit I" headed "Taxes Paid"; or in case plaintiff shall sell any of said tracts or parcels of property and the water right thereof (whether sold together or sold separately) for a lesser amount than the aggregate sums shown in said two columns of "Exhibit I"

opposite the description of such tract, then said exemption from assessment shall terminate when plaintiff has received such lesser sale price.

The court does not here pass on the question of the right to transfer the water rights from said land.

That said exemption from defendant's said maintenance liens will also terminate as to all the property listed in "Exhibit I" hereto attached if, when, and as soon as plaintiff shall hereafter receive in the aggregate from [86] the sale of all property belonging to it an amount equal to the par value of its outstanding capital stock which represents the balance of principal remaining unpaid upon its previous bond indebtedness. Said outstanding capital stock of plaintiff consists of 37,601 shares of the par value of $45.00 each.

V.

If and when any of the parcels of property listed in "Exhibit I" hereto shall be sold by plaintiff to buyers all interest of such buyers therein under such contracts of sale shall be subject to all maintenance assessments thereafter levied by defendant to the same extent as are the other lands of the project and whenever plaintiff shall part with complete title to any of said land or water stock the said land and water stock shall be subject to defendant's maintenance assessments levied thereafter to the same extent as the other lands and water stock of the project.

VI.

In case plaintiff should sell any of the several tracts or parcels of property listed in "Exhibit I" for an amount in excess of the sum shown as to such tract or parcel under the column headed "Amount Due at Date of Deed" plus the further sum paid out for taxes by plaintiff thereon which is shown opposite such tract under that column in "Exhibit I" headed "Taxes Paid" then the assessments levied by defendant for the years 1936 and 1937, and each of said assessments, with the interest thereon, shall constitute a lien upon any excess moneys so received by plaintiff as proceeds of the sale of such tract or parcel of property. [87]

VII.

The defense that plaintiff is estopped to assert in this suit the priority of its right and claim to the property here involved is without merit.

VIII.

That the water rights appurtenant to the lands here involved have not been abandoned or forfeited through non-user.

IX.

That plaintiff is entitled to decree in harmony with the foregoing findings of fact and conclusions of law containing appropriate provisions for the enforcement thereof and awarding to plaintiff its costs herein.

Dated June 27, 1938.

CHARLES C. CAVANAH
District Judge. [88]

"EXHIBIT I".

LANDS ACQUIRED BY FORECLOSURES OF WATER CONTRACTS BY TRUSTEE BANK

Contract No.	Legal Description.	No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1027-A	NW¼NW¼ 9-9-17	40.00	7990	3/25/20	$1848.59	$1876.52
1858	SE¼SW¼ 28-8-16	40.00	7983	1/21/20	1385.69	798.93
809	NE¼NW¼ 34-8-16	40.00	7825	5/31/19	2265.63	1081.51
1898	NE¼SW¼ 28-8-16	37.50	9768	3/19/17	2161.12	782.35
1378	SW¼NW¼ 29-7-16	40.00	7871	12/31/17	1984.82	776.85
1378	NW¼SW¼ 29-7-16	40.00	7872	12/31/17	1984.82	710.67
1550	NW¼NE¼ 33-7-16	38.00	7881	4/ 4/18	2131.18	729.96
1550	NE¼NW¼ 33-7-16	40.00	7882	4/ 4/18	2131.18	768.17
1550	NW¼NW¼ 33-7-16	38.00	7883	4/ 4/18	2131.18	728.71
1839	NE¼NW¼ 29-7-16	35.00	7957	5/14/19	2127.59	680.79
1375	SW¼SE¼ 19-7-16	34.00	7767	4/ 4/18	1725.58	806.22
1375	SE¼SE¼ 19-7-16	40.00	7868	4/ 4/18	2030.10	943.29
1349	NE¼NW¼ 30-7-16	40.00	7960	7/31/18	1067.99	868.73
1169	Lot 3 4-9-15	41.00	7876	4/ 4/18	1744.50	822.18
1041	SE¼NE¼ 1-9-15	40.00	7984	5/14/19	1701.66	811.38
1036	NW¼SW¼ 1-9-15	40.00	7874	3/19/17	2197.37	811.39
1038	SE¼SE¼ 1-9-15	40.00	9173	3/ 9/28	1735.42	354.27
2339	SW¼SW¼ 24-8-15	40.00	7351	12/23/22	2277.14	1099.67

LANDS ACQUIRED BY FORECLOSURES OF WATER CONTRACTS BY TRUSTEE BANK (Cont.)

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1102	NW¼SE¼	14-8-15	40.00	7859	3/19/17	2141.99	892.88
1102	NE¼SW¼	14-8-15	40.00	7860	3/19/17	2141.99	923.08
1264	SW¼NE¼	26-8-15	35.00	7863	12/ 4/17	1725.17	896.89
1717	NE¼NW¼	22-8-15	32.00	8052	3/19/17	1719.05	740.56
1552	NW¼NW¼	22-8-15	30.00	7884	3/19/17	1611.63	699.01
1552	SW¼NW¼	22-8-15	30.00	7885	3/19/17	1611.63	698.99
1622	SW¼NE¼	15-8-15	30.00	7888	4/ 8/18	1701.42	725.84
1667	SW¼NW¼	15-8-15	33.00	7890	3/19/17	1783.45	806.60
1667	NW¼SW¼	15-8-15	27.00	7891	3/19/17	1621.32	660.05
2248	NE¼NW¼	25-8-15	40.00	7928	4/ 5/18	2198.34	988.66
1739	NE¼SW¼	15-8-15	30.00	7901	3/19/17	1605.14	733.33
1162	NE¼SE¼	34-8-15	40.00	7909	3/19/17	2160.40	1013.49
632	NE¼NW¼	35-8-15	40.00	7913	2/10/22	2394.22	963.27
2061	NW¼NW¼	21-8-15	30.00	7916	4/14/23	2654.64	694.93
1746	NW¼NW¼	24-8-15	40.00	7917	3/19/17	2043.78	820.66
1746	SW¼NW¼	24-8-15	35.00	7918	3/19/17	1788.31	728.69

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LANDS ACQUIRED BY FORECLOSURES OF WATER CONTRACTS BY TRUSTEE BANK (Cont.)

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1821	NE¼NE¼	22-8-15	30.00	7920	3/19/17	$1641.31	$ 692.22
1975	SW¼NE¼	27-8-15	20.00	7924	3/19/17	1080.21	407.59
1976	NW¼SE¼	27-8-15	35.00	7925	3/19/17	1354.26	715.28
1738	NW¼SE¼	15-8-15	35.00	7972	3/19/17	1872.67	837.93
2071	NW¼NE¼	22-8-15	22.00	7973	5/14/19	1070.01	508.97
1843	NE¼NW¼	23-8-15	35.00	7975	9/ 8/19	1410.22	768.58
1472	SW¼SE¼	27-8-15	40.00	7977	9/ 8/19	2378.44	813.11
1222	SE¼NW¼	35-8-15	40.00	7979	9/ 8/19	2320.57	963.25
1233	NE¼SE¼	35-8-15	40.00	7980	7/31/18	1748.92	849.60
1234	SE¼SE¼	35-8-15	40.00	7981	7/31/18	1745.11	849.60
2060	NE¼NW¼	21-8-15	25.00	7989	5/14/19	1567.22	578.58
1844	SE¼SW¼	14-8-15	40.00	7993	9/ 8/19	1611.69	923.06
1647	NE¼SE¼	15-8-15	35.00	8001	3/14/21	1129.10	837.93
2077	SE¼SE¼	15-8-15	35.00	8002	3/14/21	1129.10	837.94
1733	NW¼SW¼	14-8-15	40.00	8003	3/14/21	1290.20	923.08
1654	SW¼SW¼	14-8-15	40.00	8004	3/14/21	1290.40	923.06
2323	NW¼NE¼	28-8-15	30.00	8106	2/ 4/24	1116.22	613.74
965	NE¼SW¼	34-8-15	40.00	8115		2464.78	793.06
532-A	Lot 2	1-8-15	39.93	9089	12/14/26	2082.10	763.95
783	SE¼SW¼	27-8-15	40.00	9092	7/21/26	1268.49	824.12

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1344	SE¼SW¼	20-8-15	40.00	9155	11/21/27	1810.82	733.08
2016	SW¼SW¼	8-8-15	25.00	7926	4/ 5/18	1362.73	633.40
877	NW¼SW¼	29-8-15	39.00	9192			852.99
878	NE¼SW¼	32-8-15	40.00	7511	9/29/23	2053.39	819.20
1244	NE¼NW¼	24-8-14	40.00	7375	8/13/23	2867.53	814.44
1837	SE¼NE¼	26-8-14	18.00	1837	8/15/23	1220.80	363.66
1838	SW¼NE¼	26-8-14	32.00	7385	8/15/23	2170.29	647.86
745	NE¼NE¼	14-8-14	35.00	7855	3/19/17	1986.15	772.52
745	NW¼NE¼	14-8-14	40.00	7856	3/19/17	2128.46	882.79
1166-A	SE¼SW¼	2-8-14	30.00	7861	12/31/17	1340.40	826.62
1279	SW¼SW¼	13-8-14	40.00	7864	3/19/17	2181.30	894.88
1359	NE¼NW¼	13-8-14	40.00	7866	4/ 4/17	1921.64	789.18
1505	NW¼NW¼	13-8-14	40.00	7873	4/ 4/18	2065.28	788.07
1972	NW¼NE¼	27-8-14	35.00	7923	4/ 5/18	1731.83	666.92
2087	NE¼NE¼	27-8-14	25.00	7927	4/ 5/18	1160.44	478.79
1248	NE¼SE¼	13-8-14	35.00	7962	7/31/18	1343.39	773.48
1423	SE¼SE¼		20.00	7963	7/31/18	766.80	442.11

LANDS ACQUIRED BY FORECLOSURES OF WATER CONTRACTS BY TRUSTEE BANK (Cont.)

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1284	NE¼SW¼	22-8-14	25.00	7964	4/ 5/20	$1387.46	$ 508.66
1284	NW¼SW¼	22-8-14	35.00	7965	4/ 5/20	1942.46	711.97
1245	NW¼NW¼	22-8-14	25.00	7966	7/31/18	1369.61	508.77
2015	NE¼NE¼	24-8-14	40.00	7967	4/ 8/14	1669.08	814.50
1256	SE¼NE¼	24-8-14	30.00	7968	5/14/19	1244.65	610.97
1256	NE¼SE¼	24-8-14	18.00	7969	5/14/19	756.79	366.48
1254	NE¼NW¼	25-8-14	35.00	7970	9/ 8/19	1437.96	916.71
1232	NW¼NE¼	13-8-14	40.00	8027	10/24/22	2359.66	782.31
1502	SW¼NE¼	13-8-14	35.00	8028	7/31/18	1750.14	684.23
658	NE¼NW¼	34-8-14	35.00	8031	12/31/17	1877.70	692.29
1504	NE¼SW¼	13-8-14	40.00	8035-6	1/21/24	1209.21	896.11
1504	NW¼SW¼	13-8-14	40.00	8035-6	1/21/24	1209.21	896.11
638	N½NE¼	34-8-14	80.00	9091	12/14/26	3992.67	1266.05
1687	S½NW¼	26-8-14	80.00	9097	11/30/25	2445.32	1760.88
1283-A	NW¼SW¼	3-8-14	40.00	9186	6/ 6/28	790.79	456.98
1561	SW¼SW¼	23-8-14	25.00	9319		523.41	416.58
437-A	SW¼SE¼	2-8-14	40.00	8999		1479.18	962.60
1706	SE¼NW¼	25-7-15	25.00	7900	4/ 5/18	1265.28	668.05
2301-A	NW¼NE¼	29-7-15	37.00	7379	1/21/24	1713.43	977.62
1706	NW¼NW¼	25-7-15	40.00	7898	4/ 5/18	2022.45	1002.95

LANDS ACQUIRED BY FORECLOSURES OF WATER CONTRACTS BY TRUSTEE BANK (Cont.)

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1706	SW¼NW¼	25-7-15	40.00	7899	4/ 5/18	2022.45	1002.95
477	NE¼SE¼	25-7-15	40.00	8019	5/14/19	2128.68	967.55
478	NW¼SE¼	25-7-15	40.00	8020	5/14/19	2128.68	967.56
476	SE¼SE¼	25-7-15	40.00	9000		1388.15	960.36
1835	SW¼SW¼	33-7-14	20.00	6258	3/19/17	1080.74	439.69
1544	NE¼SE¼	14-7-14	40.00	7877	12/31/17	2181.37	830.16
1544	NW¼SE¼	14-7-14	40.00	7878	12/31/17	2181.37	830.17
1544	SW¼SE¼	14-7-14	20.00	7879	12/31/17	1090.68	415.12
1544	SE¼SE¼	14-7-14	10.00	7880	12/31/17	545.34	208.24
1591	SW¼NW¼	28-7-14	40.00	7886	4/ 5/18	2037.79	844.49
1699-A	NE¼NW¼	27-7-14	37.00	7895	4/ 5/18	1978.68	813.75
1699-A	SE¼NW¼	27-7-14	40.00	7896	4/ 5/18	2139.12	873.31
2310-A	SE¼NW¼	26-7-14	32.00	7948	5/14/19	1530.42	827.54
684-A	NE¼NE¼	27-7-14	40.00	7949	5/14/19	2094.20	871.36
694-A	NW¼NE¼	27-7-14	40.00	8017	5/14/19	2094.20	871.31
684-A	SE¼NE¼	27-7-14	40.00	8018	5/14/19	2094.20	871.32
1440	NE¼NE¼	33-7-14	30.00	7950	1/21/20	1577.62	631.71
1441	NW¼NE¼	33-7-14	40.00	7951	1/21/20	2103.49	842.38
1442	SW¼NE¼	33-7-14	40.00	7952	1/21/30	2103.49	842.38

LANDS ACQUIRED BY FORECLOSURES OF WATER CONTRACTS BY TRUSTEE BANK (Cont.)

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1443	SE¼NE¼	33-7-14	35.00	7953	1/21/20	$1840.55	$ 737.21
1439	SW¼NW¼	34-7-14	30.00	7956	1/21/20	1577.62	654.22
1439	SE¼NW¼	34-7-14	25.00	7958	1/21/20	1331.60	544.69
2258	Lot 1	18-7-14	20.00	9544	3/19/17	1595.04	305.19
578-A	NE¼NW¼	25-7-14	20.00	8005	7/31/18		471.19
578-A	SE¼NW¼	25-7-14	40.00	8016	7/31/18	3259.79	942.44
1635-36-37-A	E½ SW¼, SW¼ SE¼	35-7-14	120.00	9096	12/14/26	4393.97	2775.73
2257	Lot 4	7-7-14	29.82	9101	12/30/25	1639.81	564.73
715	NW¼SE¼	34-7-14	40.00	9133	3/28/27	1230.71	755.02
1454	SW¼NW¼	29-7-14	25.00	7457	12/31/17	1090.72	536.12
1455	SE¼NW¼	29-7-14	25.00	7458	12/31/17	1090.72	536.11
1492-A	SW¼NW¼	22-7-14	35.00	8015	9/ 8/19	1446.04	698.18
2584	SW¼NE¼	14-6-13	40.00	7490	5/ 4/19	2673.52	963.62
2748	SE¼SE¼	18-6-14	30.00	7904	4/ 6/18	1963.39	648.41
2747	SW¼SE¼	18-6-14	15.00	7905	4/ 6/18	981.69	311.28
2687	NE¼SE¼	19-6-14	35.00	7943	5/14/19	1622.74	747.34
2688	SE¼SE¼	19-6-14	23.00	7944	5/14/19	1159.10	535.09
2791	Lot 2	30-6-14	40.90	9153	11/21/27	1810.82	627.30
2611	NE¼NW¼	20-6-14	20.00	7945	2/14/19	1376.90	429.84

LANDS ACQUIRED BY FORECLOSURES OF WATER CONTRACTS BY TRUSTEE BANK (Cont.)

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1135-A	SW¼SW¼	3-8-14	35.00	8022	9/ 8/19	1361.53	693.31
1397	NE¼NW¼	35-7-15	10.00	8006	2/10/22	476.95	309.45
1398	NW¼NW¼	35-7-15	40.00	8007	2/10/22	1907.79	1237.93
2232	SE¼NE¼	3-9-14	40.00	7383	1/21/24	2199.91	856.13
2232	SW¼NW¼	2-9-14	40.00	7384	1/21/24	2199.91	830.22
			4,781.15			$232,501.26	$104,566.08

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SHERIFF'S DEEDS TO TWIN FALLS NORTH SIDE INVESTMENT CO., LTD., BY REASON OF ASSIGNMENT OF SHERIFF'S CERTIFICATE FROM TRUSTEE.

Contract No.	Land Description		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1653	NW¼SE¼	27-8-14	35.00	7818	1/21/20	$2045.24	$ 783.53
1653	NE¼SW¼	27-8-14	40.00	7716	1/21/20	2337.41	978.68
701	NE¼SE¼	33-8-14	40.00	7718	1/21/20	2094.74	910.31
669-A	SE¼SW¼	23-7-14	40.00	7801	1/21/20	2318.67	926.47
1458	SW¼SW¼	27-7-14	37.00	7701	1/21/20	2329.58	813.13
1459	SE¼SW¼	27-7-14	38.00	7702	1/21/20	2329.58	829.67

SHERIFF'S DEEDS TO TWIN FALLS NORTH SIDE INVESTMENT CO., LTD., BY REASON OF ASSIGNMENT OF SHERIFF'S CERTIFICATE FROM TRUSTEES (Cont.)

Contract No.	Land Description		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1451-A	SE¼SE¼	33-7-14	40.00	7703	1/21/20	2329.58	897.85
1448	NE¼SE¼	33-7-14	40.00	7704	1/21/20	2329.58	897.84
1449-A	NW¼SE¼	33-7-14	40.00	7705	1/21/20	2329.58	897.84
1450-A	SW¼SE¼	33-7-14	40.00	7706	1/21/20	2329.58	897.85
1445-A	NE¼SW¼	34-7-14	40.00	7707	1/21/20	2098.82	903.82
1445-A	NW¼SW¼	34-7-14	40.00	7708	1/21/20	2098.82	903.82
1446-A	SW¼SW¼	34-7-14	30.00	7709	1/21/20	2098.82	699.71
1447-A	SE¼SW¼	34-7-14	35.00	7710	1/21/20	2098.82	801.41
702	Lot 3	1-9-14	40.37	7731	10/13/17	2105.55	829.49
702	Lot 4	1-9-14	40.52	7732	10/13/17	2113.38	932.99
765	SW¼SW¼	5-9-16	40.00	7739	3/26/20	2329.58	783.52
765	SE¼SW¼	5-9-16	40.00	7740	3/26/20	2329.58	783.49
1023	Lot 6	6-9-16	30.00	7750	1/21/20	1919.27	628.41
1022	NE¼SW¼	6-9-16	38.00	7749	1/21/20	2343.48	794.91
1024	Lot 7	6-9-16	32.90	7751	1/21/20	1931.93	688.87
1025	SE¼SW¼	6-9-16	33.00	7752	1/21/20	2343.48	691.04
1017	NE¼SE¼	6-9-16	35.00	7760	1/21/20	2343.48	733.21
1013	NW¼SE¼	6-9-16	35.00	7753	1/21/20	2343.48	733.24
1014	SW¼SE¼	6-9-16	35.00	7754	1/21/20	2343.48	733.24

SHERIFF'S DEEDS TO TWIN FALLS NORTH SIDE INVESTMENT CO., LTD., BY REASON OF ASSIGNMENT OF SHERIFF'S CERTIFICATE FROM TRUSTEES (Cont.)

Contract No.	Land Description		No. Shares.	Cert. No.	Date of Deed.	Amonnt Due at Date of Deed.	Taxes Paid.
1015	SE¼SE¼	6-9-16	30.00	7761	1/21/20	2343.48	628.52
1287	Lot 2	2-9-15	39.79	7736	1/21/20	2329.58	806.60
1285	NW¼SE¼	35-8-15	40.00	7726	1/21/20	2329.58	872.12
1239	NE¼NE¼	23-8-14	35.00	6385	1/21/20	2322.43	725.34
1608	SW¼NW¼	24-8-14	30.00	7714	1/21/20	2322.43	607.85
1238	SE¼NE¼	23-8-14	20.00	7715	1/21/20	2322.43	414.55
J-5			1,129.58		/	$69,585.44	$24,629.32

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LANDS ACQUIRED BY FORECLOSURE BY T. F. N. S. LAND AND WATER CO. OF JUNIOR MORTGAGE OR MORTGAGES TAKEN IN ADJUSTMENT OF WATER CONTRACT

Contract No.	Land Description		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
X-1009-A	SE¼SW¼	9-8-16	40.00	8538	3/16/25	$1703.42	$ 853.00
1532	NE¼NW¼	32-7-16	40.00	7475	5/14/19	406.20	746.85
1554	SW¼SW¼	15-8-15	40.00	9175	6/13/27	1532.53	755.29
1235	N½ SW¼SE¼	14-8-15	20.00	9189	9/25/28	492.95	167.64
1728	Lot 1 of	1-8-15	39.97	7719	1/21/20	1538.28	938.42

SHERIFF'S DEEDS TO TWIN FALLS NORTH SIDE INVESTMENT CO., LTD., BY REASON OF ASSIGNMENT OF SHERIFF'S CERTIFICATE FROM TRUSTEES (Cont.)

Contract No.	Land Description		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
785	NE¼SE¼	8-8-15	40.00	9548	12/ 1/31	924.21	691.73
875	SW¼SE¼	8-8-15	40.00	9113	7/ 2/25	2384.95	815.29
1890	NW¼NW¼	28-8-15	20.00	8049	7/28/24	1429.43	483.02
1812	SE¼SW¼	12-8-14	35.00	8439	4/ 6/18	876.36	976.29
555	NW¼NW¼	15-8-14	40.00	9110	11/16/25	2098.33	857.09
1435	SW¼SW¼	28-7-14	40.00	9118	11/16/25	1728.99	800.86
			394.97			$15,115.65	$7,885.48

CONTRACTS ASSIGNED TO TWIN FALLS NORTH SIDE INV. CO. LTD., AND FORECLOSED BY INV. CO.

727	SE¼NW¼	2-9-15	40.00	9147	3/14/27	$1975.97	$ 516.35
						$1,975.97	$516.35

LANDS DEEDED TO T. F. N. S. LAND AND WATER COMPANY IN LIEU OF FORECLOSURE OF WATER CONTRACT

Contract No.	Land Description		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
774	Lot 3	31-8-15	32.76	7578	9/11/15)		675.18
774	Lot 4	31-8-15	32.92	7579	9/11/15)		672.06
774	NE¼SW¼	31-8-15	40.00	7580	9/11/15)		817.18
774	SE¼SW¼	31-8-15	40.00	7581	9/11/15)	4583.09	818.74
775	NE¼SE¼	31-8-15	40.00	7582	9/11/15)		817.21
775	NW¼SE¼	31-8-15	40.00	7583	9/11/15)		817.20
775	SW¼SE¼	31-8-15	40.00	7584	9/11/15)		818.75
775	SE¼SE¼	31-8-15	40.00	7585	9/11/15)	5033.60	817.90
1571	NE¼SW¼	33-7-14	30.00	7615	3/14/16	1480.80	649.78
J-6			335.68			$11,097.49	$6,904.00

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DEEDED TO TWIN FALLS NORTH SIDE INV. CO. LTD., IN LIEU OF FORECLOSURE OF WATER CONTRACT

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1864	SE¼SE¼	28-8-16	30.00	9145	6/ 9/25	$ 712.12	$ 517.32
1640	NW¼SE¼	19-8-16	35.00	7623	3/19/16	1459.11	722.38
1689	NW¼SE¼	32-7-16	35.00	7483	10/ 3/21	2110.36	663.38
521	SW¼NE¼	28-7-16	40.00	7575	5/ 8/16	1467.20	862.39

DEEDED TO TWIN FALLS NORTH SIDE INV. CO. LTD., IN LIEU OF FORECLOSURE OF WATER CONTRACT (Cont.)

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1934	SE¼NW¼	22-7-16	40.00	7711	2/23/15	1728.00	832.82
1935	SW¼NE¼	22-7-16	40.00	7712	1/23/15	1728.00	832.84
1520	NW¼NW¼	23-7-16	40.00	7782	7/22/20	2060.88	756.38
1865	SW¼SE¼	28-8-16	40.00	7994	4/ 6/18	1833.72	798.93
X-1114	N½ SW¼-S½SW¼	24-7-16	100.00	8160-2	1/30/23	3089.50	2888.44
1549	SW¼NE¼	32-7-16	30.00	7473	4/15/16	1235.25	569.00
1351	NE¼SE¼	19-7-16	34.00	7601	5/24/15	1577.34	720.76
1032	Lot 3	1-9-15	39.60	7590	8/ 3/16	1145.22	803.94
1042	NE¼SE¼	1-9-15	40.00	7591	7/ 5/16	1310.40	811.31
1034	SE¼NW¼	1-9-15	40.00	7734	10/29/18	1986.00	811.17
1033	SW¼NW¼	1-9-15	40.00	7733	10/29/18	1986.00	811.17
1035	NE¼SW¼	1-9-15	40.00	7735	10/29/18	1986.00	811.17
1040	Lot 2	1-9-15	39.76	8246	6/15/25	1676.50	767.28
X-1126	NE¼SW¼	3-8-17	4.80	7349	7/ 5/23	258.10	103.45
679	SE¼NE¼	7-8-15	35.00	7576	2/12/16	1384.10	880.51
679	NE¼SE¼	7-8-15	40.00	7577	2/12/16	1581.83	1047.29
1236	SE¼SE¼	14-8-15	40.00	7593	12/ 1/16	1362.59	896.59
1237	NE¼NW¼	24-8-15	40.00	7594	5/14/16	1885.53	829.00
1681	SE¼SW¼	26-8-15	30.00	7627	4/ 8/16	1450.30	769.43

DEEDED TO TWIN FALLS NORTH SIDE INV. CO. LTD., IN LIEU OF FORECLOSURE OF WATER CONTRACT (Cont.)

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1752	SE¼NW¼	23-8-15	20.00	7633	2/ 2/15	859.00	444.44
1757	NW¼NW¼	17-8-15	35.00	7634	2/23/15	1517.60	898.14
1758	NE¼NE¼	18-8-15	20.00	7635	2/23/15	867.20	467.39
1954	NW¼NE¼	18-8-15	35.00	7645	2/23/15	1517.60	817.77
1225	NE¼NW¼	26-8-15	35.00	7769	10/29/18	1764.00	764.60
1225	NW¼NW¼	26-8-15	30.00	7770	10/29/18	1512.00	645.25
1225	SW¼NW¼	26-8-15	35.00	7771	10/29/18	1764.00	818.57
1806	SW¼SW¼	13-8-15	40.00	7636	5/24/15	1787.74	914.46
1909	NE¼SE¼	23-8-15	33.00	7642	7/31/15	1483.76	947.13
1910	SE¼SE¼	23-8-15	40.00	7643	7/31/15	1798.50	1148.26
2068	SE¼NW¼	18-8-15	30.00	7649	12/27/15	1379.20	700.43
2070	SE¼SE¼	7-8-15	40.00	7650	6/21/16	1496.70	1047.31
2096	Lot 2	18-8-15	20.00	7654	12/27/15	914.36	467.41
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2066	NW¼SE¼	7-8-15	40.00	7688	12/27/15	$1798.40	$1047.31
1793	SW¼SE¼	7-8-15	30.00	7687	6/12/16	926.19	779.96
1226	NE¼NW¼	7-8-15	37.00	7720	5/ 1/17	1587.30	896.53
1229	SE¼NW¼	7-8-15	30.00	7721	5/ 1/17	1287.00	760.41

DEEDED TO TWIN FALLS NORTH SIDE INV. CO. LTD., IN LIEU OF FORECLOSURE OF WATER CONTRACT (Cont.)

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1227	Lot 1	7-8-15	30.63	7787	5/ 1/17	1314.02	755.38
1228	Lot 2	7-8-15	30.73	7788	5/ 1/17	1318.31	762.83
1070	NE¼SE¼	14-8-15	40.00	7722	2/13/19	1931.68	896.60
1346	NE¼SE¼	19-8-15	20.00	7723	3/22/18	632.19	452.06
1346	NW¼SE¼	19-8-15	35.00	7724	3/22/18	1106.35	790.77
1919	SW¼SW¼	21-8-15	40.00	7725	3/10/20	2254.36	912.21
729-A	SW¼NW¼	8-8-15	40.00	9108	2/ 5/16	1848.23	1116.68
1611	SW¼NW¼	14-8-15	40.00	8176	12/10/24	747.82	883.18
683	Lot 2	31-8-15	27.60	7785	11/11/18	1231.52	632.87
683	SE¼NW¼	31-8-15	40.00	9169	11/11/18	2016.00	568.65
787	SE¼NE¼	14-8-14	20.00	7418	12/13/23	739.20	4288.50
508	NE¼SE¼	11-8-14	40.00	7463	6/22/18)		1044.75
508	SE¼SE¼	11-8-14	40.00	7464	6/22/18)		966.75
508	NW¼SW¼	12-8-14	40.00	7465	6/22/18)		1114.76
508	SW¼SW¼	12-8-14	40.00	7466	6/22/18)	6881.75	1112.38
1240	NE¼SE¼	26-8-14	36.00	7595	12/30/16	1560.70	713.68
1241	NW¼SE¼	26-8-14	40.00	7596	12/30/16	1734.14	793.15
1467	SE¼SE¼	26-8-14	40.00	7606	12/10/15	1099.44	793.17
1745	NW¼NE¼	23-8-14	40.00	7632	6/10/16	1305.20	829.00
1813	NE¼SW¼	12-8-14	35.00	7637	2/23/16	1624.35	975.45

DEEDED TO TWIN FALLS NORTH SIDE INV. CO. LTD., IN LIEU OF FORECLOSURE OF WATER CONTRACT (Cont.)

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1942	SW¼SE¼	26-8-14	40.00	7644	3/25/16	1657.90	793.17
528-A	N½SW¼	10-8-14	80.00	8159	12/ 5/24	2685.48	1824.60
1639	NW¼SE¼	13-8-14	35.00	7850	3/25/16	1631.69	772.62
1639	E½ SW¼SE¼	13-8-14	10.00	7851	3/25/16	466.19	220.78
1173	SW¼NE¼	22-8-14	35.00	7790	1/13/22)		711.70
1173	SE¼NW¼	22-8-14	25.00	7789	1/13/22)	3002.40	508.95
1174	S½ SW¼	22-8-14	70.00	8174-5	5/17/25	2115.32	1383.01
1360	NE¼NE¼	30-7-15	35.00	7602	8/ 5/15	1239.70	926.18
1516	Lot 6	6-7-15	29.8	7609	6/28/16	1124.44	738.20
1708	SW¼SE¼	6-7-15	35.00	7630	2/10/12)		867.73
1708	SE¼SW¼	6-7-15	32.00	7631	2/10/12)	2408.40	791.30
1874	SE¼NW¼	28-7-14	10.00	4661	3/ 3/11	339.20	216.46
1361-A	SW¼NE¼	25-7-14	28.00	7603	6/24/16	917.28	666.33
1434	SE¼SE¼	28-7-14	25.00	7605	7/27/15	885.10	536.62
1577	NW¼SW¼	28-7-14	40.00	7616	11/ 1/11	1397.43	820.63
1489-A	NW¼NW¼	22-7-14	35.00	7608	9/19/14	1040.02	698.19

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DEEDED TO TWIN FALLS NORTH SIDE INV. CO. LTD., IN LIEU OF FORECLOSURE OF WATER CONTRACT (Cont.)

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1545	SE¼SW¼	14-7-14	30.00	7612	2/15/16	$1089.90	$ 629.30
1546-A	SW¼SW¼	14-7-14	30.00	7613	2/15/16	1089.90	629.32
1557	SE¼SE¼	21-7-14	30.00	7614	3/ 9/17	1169.70	585.42
1648-A	NE¼SE¼	21-7-14	25.00	7624	3/ 9/17	974.75	497.08
1579	SE¼SE¼	20-7-14	25.00	7617	2/23/15	975.00	543.61
1580	SW¼SE¼	20-7-14	40.00	7618	2/23/15	1560.00	829.34
1581	SE¼SW¼	21-7-14	30.00	7619	2/23/15	1300.80	636.37
1582	SW¼SW¼	21-7-14	25.00	7620	2/23/15	1084.00	540.75
1701	SW¼NW¼	33-7-14	20.00	7773	2/23/15	867.20	434.11
1655	NE¼NE¼	29-7-14	30.00	7625	5/12/16	858.60	599.04
1656	NW¼NW¼	28-7-14	30.00	7626	3/24/13	1264.95	646.05
1695	NW¼SE¼	21-7-14	30.00	7629	3/21/11	1160.40	585.57
1873	NE¼NW¼	28-7-14	20.00	7639	3/ 3/11	678.40	430.69
1964	Lot 3	3-7-14	31.40	7646	12/10/15	1437.84	641.78
1965	Lot 4	3-7-14	31.10	7647	12/10/15	1424.10	637.24
2406	NE¼SE¼	17-7-14	15.00	9421	10/ 4/29	1000.43	60.14
565	NE¼SW¼	20-7-14	40.00	8786	3/10/28	2977.40	685.30
2571	NW¼SE¼	13-6-14	30.00	7660	5/ 4/16	1566.00	698.84

DEEDED TO TWIN FALLS NORTH SIDE INV. CO. LTD., IN LIEU OF FORECLOSURE OF WATER CONTRACT (Cont.)

Contract No.	Legal Description.		No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
2577	NE¼SW¼	13-6-13	35.00	7661	8/ 5/15	1764.00	809.52
2578	SE¼SW¼	13-6-13	40.00	7662	8/ 5/15	2016.00	936.66
2773	NE¼SE¼	13-6-13	20.00	7667	1/22/17	1029.30	465.50
2574	SW¼SW¼	13-6-13	35.00	7678	12/ 1/18	1998.78	809.53
2575	NW¼NW¼	24-6-13	35.00	7679	12/ 1/18	1998.78	813.46
1997-A	NE¼SE¼	5-9-18	20.00	7835	11/ 8/18	643.69	425.86
1887	NE¼SE¼	34-6-14	38.00	7640	8/ 5/16	1578.90	965.47
1888	NW¼SE¼	34-6-14	35.00	7641	8/ 5/16	1454.25	907.88
436-A	SE¼NE¼	26-7-14	40.00	7803	9/ 9/21)		979.31
436-A	SW¼NE¼	26-7-14	40.00	7802	9/ 9/21)	4967.20	979.32
2023	NW¼SW¼	35-6-14	40.00	7648	7/ 7/16	1776.57	1012.82
2613	NW¼NE¼	20-6-14	30.00	7786	3/ 5/21	1264.80	645.19
			3,643.42			$154,502.05	$81,952.07

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SUPPLEMENTAL LIST

Contract No.	Legal Description.		How Acquired.	No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
1413	NW¼SE¼	22-7-16	QC Deed to Inv. Co.	30.00	7823	3/ 2/16	$1224.00	$655.98
683	Lot 1	31-8-15	QC Deed to Inv. Co.	32.44	7784	11/11/18	1634.98	869.72
1692	SW¼NE¼	7-8-15	QC Deed to Inv. Co.	25.00	7670	2/ 1/12	930.87	629.03
1225	SE¼NW¼	26-8-15	QC Deed to Inv. Co.	40.00	7772	10/29/18	2016.00	997.95
701	SE¼SE¼	33-8-14	Foreclosure by Trustee	25.00	7718	1/21/20	1309.21	509.43
S-2021	NE¼NE¼	36-8-14	QC Deed to Inv. Co.	40.00	7808	7/27/17	663.60	794.45
S-2021	NW¼NE¼	36-8-14	QC Deed to Inv. Co.	40.00	7809	7/27/17	663.60	794.46
1703	NE¼SE¼	2-7-14	QC Deed to Inv. Co.	40.00	7766	7/11/16	.1478.40	1013.74
1703	NW¼SE¼	2-7-14	QC Deed to Inv. Co.	40.00	7767	7/11/16	1656.00	1013.74
669-A	NE¼SW¼	23-7-14	Foreclosure by Trustee	40.00	7798	1/21/20	2318.67	926.52
1680	SW¼SW¼	34-6-14	QC Deed to Inv. Co.	30.00	7781	9/29/19	2716.98	698.57
666	NE¼NE¼	25-8-14	QC Deed to Inv. Co.	40.00	7816	8/ 5/15)		1016.02
666	NW¼NE¼	25-8-14	QC Deed to Inv. Co.	40.00	7817	8/ 5/15)	2833.60	1026.01
1151-2	S½ NW¼	9-9-16	Foreclosure by Trustee	80.00	7745-6	1/21/20	4659.16	1980.78
1392	SE¼SW¼	22-7-16	QC Deed to Inv. Co.	40.00	7822	4/15/16	1464.40	622.66
1996	SE¼NE¼	5-9-18	QC Deed to Inv. Co.	20.00	7834	11/ 8/18	643.70	425.86
1640	NE¼SE¼	19-8-16	Foreclosure by Trustee	35.00	7982	1/21/20	2320.16	721.41

SUPPLEMENTAL LIST

Contract No.	Legal Description.		How Acquired.	No. Shares.	Cert. No.	Date of Deed.	Amount Due at Date of Deed.	Taxes Paid.
728	NE¼SW¼	2-9-15	Foreclosure by L.&W. Co.	40.00	8126	6/ 2/24	1270.55	788.09
1766	SW¼SE¼	18-7-14	Foreclosure by L.&W. Co.	40.00	9125	8/23/26	2112.21	778.80
1679	Lot 4 and NW¼SW¼	2-7-14	Foreclosure by L.&W. Co.	72.12	9170	8/13/28	1642.22	1110.08
				789.56			$33,558.31	$17,373.30

SUMMARY

Number Shares Water Stock,	11,114.36
Amount due at date of deed,	$518,336.17
Taxes paid,	$243,826.60

[98]

In the District Court of the United States for the District of Idaho, Southern Division.

Equity No. 1997.

IDAHO FARMS COMPANY, a corporation,
Plaintiff,

vs.

NORTH SIDE CANAL COMPANY, LIMITED, a corporation,
Defendant.

DECREE

Filed June 27, 1938.

This cause came on to be heard at this term and was argued by counsel and duly considered; and the court having found the facts specially and separately stated the same and its conclusions of law thereon,

It Is Now Ordered, Adjudged, and Decreed as follows:

I.

That the lien for maintenance and operation for the year 1935 claimed by defendant, North Side Canal Company, Limited, upon the property of plaintiff, Idaho Farms Company, listed in "Exhibit I" hereto attached, is not binding in any respect upon said property, or any parcel thereof, but if it were binding upon said property, or any part thereof, or any interest or right of plaintiff therein, it would be binding to no greater extent than its said maintenance liens for the years 1936 and 1937

are binding upon certain excess proceeds (if any) from the sale of such properties as specifically defined in paragraph IV hereof.

II.

That all the properties of plaintiff described in "Exhibit I" hereto attached have been during the year 1935 [100] and years subsequent thereto and are now exempt from the assessment liens of the defendant company; that plaintiff has the right to sell and keep sold all of said lands and water stock (whether the water stock appurtenant to each parcel of land so listed is sold with the land or is sold separately) free and clear of any claim of defendant for maintenance liens for the years 1935 and subsequent.

That such exemption from defendant's said maintenance liens will terminate as to any specific tract or parcel of land and the water stock appurtenant thereto listed in "Exhibit I" if, when, and as soon as plaintiff has received upon sale thereof the sum shown opposite the description thereof under the column of "Exhibit I" headed "Amount Due at Date of Deed" plus the further sum paid out by plaintiff for taxes thereon which further sum is also shown as to each tract under that column in "Exhibit I" headed "Taxes Paid"; or in case plaintiff shall sell any of said tracts or parcels of property and the water right thereof (whether sold together or sold separately) for a lesser amount than the aggregate sums shown in said two columns of "Exhibit I" opposite the description of such

tract, then said exemption from assessment shall terminate when plaintiff has received such lesser sale price.

That said exemption from defendant's said maintenance liens will also terminate as to all the property listed in "Exhibit I" hereto attached if, when, and as soon as plaintiff shall hereafter receive in the aggregate from the sale of all property belonging to it an amount equal to the par value of its outstanding capital stock which represents the balance of principal remaining unpaid upon its previous [101] bond indebtedness. Said outstanding capital stock of plaintiff consists of 37,601 shares of the par value of $45.00 each.

III.

If and when any of the parcels of property listed in "Exhibit I" hereto shall be sold by plaintiff to buyers, all interest of such buyers therein under such contracts of sale shall be subject to all maintenance assessments thereafter levied by defendant to the same extent as are the other lands of the project and whenever plaintiff shall part with complete title to any of said land or water stock the said land and water stock shall be subject to defendant's maintenance assessments levied thereafter to the same extent as the other lands and water stock of the project.

IV.

In case plaintiff should sell any of the several tracts or parcels of property listed in "Exhibit I" for an amount in excess of the sum shown as to such

tract or parcel under the column headed "Amount Due at Date of Deed" plus the further sum paid out for taxes by plaintiff thereon which is shown opposite such tract under that column in "Exhibit I" headed "Taxes Paid" then the assessments levied by defendant for the years 1936 and 1937 and each of said assessments with the interest thereon shall constitute a lien upon any excess moneys so received by plaintiff as proceeds of the sale of such tract or parcel of property.

V.

Whenever plaintiff shall sell or contract to sell any of the tracts of land listed in "Exhibit I" hereto attached with its appurtenant water stock or shall sell or con- [102] tract to sell such tract of land separately from its appurtenant water stock or shall sell or contract to sell separately from the land the water stock appurtenant to any tract of land so listed, it shall forthwith make report of such sale in writing to defendant, setting forth therein the description of the property sold or contracted to be sold, with the name and address of the purchaser and the amount of money for which the property was sold or contracted to be sold; and whenever plaintiff upon the sale of any tract of said land with its appurtenant water stock (whether said land and its appurtenant water stock are sold together or whether the land and water stock are sold separately) shall have received an amount equal to the aggregate sums set out in said "Exhibit I" hereto opposite the description of such tract, in the two

columns of said "Exhibit I" headed "Amount Due at Date of Deed" and "Taxes Paid", it shall forthwith report such fact in writing to defendant; and plaintiff shall pay over to defendant when and as received such sums (if any) received by plaintiff from the sale of any tract of land and its appurtenant water stock which is in excess of the aggregate sums set out in said two columns of "Exhibit I" opposite the description of such tract until defendant has received the full amount of its assessments for maintenance and operation for the years 1936 and 1937, with the interest thereon, levied by defendant against said tract. Said assessment for the year 1936 is at the rate of $1.25 per share upon the shares of water stock appurtenant to the several tracts of land listed in "Exhibit I" and the interest on said assessment is at the rate of 6% per annum from April 1, 1936; and said assessment for the year 1937 is [103] at the rate of $1.50 per share upon the shares of water stock appurtenant to the several tracts of said land listed in "Exhibit I" and the interest on said assessment is at the rate of 6% per annum from April 1, 1937.

VI.

The properties of plaintiff to which this decree applies are listed and described in "Exhibit I" hereto attached and made a part hereof. In the column thereof headed "Legal Description" abbreviations are used: For example, the description "NW¼NW¼ 9-9-17" means "Northwest quarter of the Northwest quarter of Section 9, Township 9

South, Range 17 East Boise Meridian"; in each case, the number following the subdivision being the section number according to the government survey, the next number being the number of the township south of the Boise, Idaho Base Line, and the next number indicating the range east of the Boise Meridian. Said list, "Exhibit I" shows by appropriate designation the agent or agency of the bondholders by whom the property was acquired through foreclosure or quitclaim deed in lieu of foreclosure. The column "Contract No." shows the number of the Carey Act water contract by which the appurtenant water right was originally sold to the settler; the column headed "No. Shares" shows the number of shares of capital stock of the defendant company appurtenant to such land as a water right; the column headed "Cert. No." shows the number of the certificate of the capital stock which evidences such water right; the column "Date of Deed" shows in abbreviated form the date when by foreclosure or quitclaim deed in lieu of foreclosure of the Carey Act contract each several tract of land was acquired; the column "Amount Due at Date of Deed" [104] shows the amount due and owing on the settler's water contract (including interest and costs of foreclosure but not attorneys' fees) at the time the property was acquired by the bondholders by foreclosure of the settler's Carey Act contract involved; or in cases where the property was acquired by quitclaim deed in lieu of foreclosure, then said column shows the amount due and owing on the settler's water contract (including interest) at the time it

was so acquired, and the column "Taxes Paid" shows with respect to each tract of land the state and county taxes paid on behalf of the bondholders by or through one or more of their several agencies subsequent to the time said property was so acquired by foreclosure or by quitclaim deed in lieu of foreclosure.

VII.

The liens of defendant for maintenance and operation of its irrigation system for the years 1935, 1936, and 1937 in this decree referred to are more specifically identified as follows:

(a) The lien for the year 1935 upon that portion of plaintiff's property situated in Jerome County, Idaho is evidenced by that certain statement of the charge for said year recorded on March 25, 1935, in the office of the County Recorder of Jerome County, in Book 105, page 407 and by claim of lien for said year recorded in said office on December 30, 1935, in Book 92, page 453; and said defendant's lien for the year 1935 upon that portion of plaintiff's property situated in Gooding County, Idaho is evidenced by that certain statement of the charge for said year recorded on March 26, 1935, in the office of the County Recorder of Gooding County, Idaho, in Book 3 of Miscellaneous Records, page 584, and by claim of lien for said year recorded in the office [105] of the County Recorder of Gooding County, Idaho, on December 30, 1935, in Book 3 of Liens, page 53.

(b) The lien for the year 1936 upon that portion

of plaintiff's property situated in Jerome County, Idaho is evidenced by that certain statement of the charge for said year recorded on March 17, 1936, in the office of the County Recorder of Jerome County, in Book 110, page 88, and by claim of lien for said year recorded in said office on December 31, 1936, in Book 92, page 484; and said defendant's lien for the year 1936 upon that portion of plaintiff's property situated in Gooding County, Idaho is evidenced by that certain statement of the charge for said year recorded on March 18, 1936, in the office of the County Recorder of Gooding County, Idaho, in Book 4 of Miscellaneous Records, page 34, and by claim of lien for said year recorded in the office of the County Recorder of Gooding County, Idaho, on December 31, 1936, in Book 3 of Liens, page 70.

(c) The lien for the year 1937 upon that portion of plaintiff's property situated in Jerome County, Idaho is evidenced by that certain statement of the charge for said year recorded on March 24, 1937, in the office of the County Recorder of Jerome County, in Book 110, page 260, and by claim of lien for said year recorded in said office on December 29, 1937, in Book 92, page 526; and said defendant's lien for the year 1937 upon that portion of plaintiff's property situated in Gooding County, Idaho is evidenced by that certain statement of the charge for said year recorded on March 24, 1937, in the office of the County Recorder of Gooding County, Idaho, in Book 4 of Miscellaneous Records, page 143, and by claim of lien for said year recorded in the office of the County [106] Recorder of Gooding County,

Idaho, on December 31, 1937, in Book 3 of Liens, page 93.

VIII.

Upon application of any person desiring to purchase any of the said parcels of property belonging to plaintiff listed in "Exhibit I" hereto attached, at a price not less than the aggregate of the sums shown opposite the description of such parcel in said exhibit under the two columns headed "Amount Due at Date of Deed" and "Taxes Paid", plaintiff shall sell the same to such applicant at such price on terms whereby one-fifth of the purchase price is payable in cash at the time of sale and the remainder in five equal annual installments bearing interest at the rate of 6% per annum, payable annually.

The court reserves jurisdiction to make, upon the application of either party hereto, such further orders, if any, as may be required to enforce and effectuate this decree.

IX.

No provision of this decree nor any expression used herein is intended to adjudicate the question of the right of plaintiff to transfer to other lands the water rights or the capital stock of defendant representing the same from the tracts of land listed in "Exhibit I" to which such water rights are now appurtenant.

X.

It Is Further Ordered, Adjudged, and Decreed that the said plaintiff, Idaho Farms Company, have and re- [107] cover from the said defendant, North

Side Canal Company, Limited, its costs herein taxed at $43.50, and that it have execution therefor.

Dated this 27th day of June, 1938.

CHARLES C. CAVANAH
District Judge. [108]

Exhibit I omitted at appellant's request, the same being identical to exhibit I attached to Findings of Fact.

[Endorsed]: Filed June 27, 1938.

[109]

[Title of District Court and Cause.]

OPINION

Edwin Snow, Boise, Idaho,
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Richards & Haga, Boise, Idaho,
Wayne A. Barclay, Jerome, Idaho,
Frank L. Stephan, Twin Falls, Idaho,
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Attorneys for the Defendant.

May 24, 1938

Cavanah, District Judge.

The nature of the suit is one brought by the plaintiff, a Delaware Corporation, against the de-

fendant an Idaho Corporation, to quiet title to certain lands and water rights acquired in the enforcement of Carey Act Contracts.

The history of the acquisition of the lands and water rights as described by the pleadings and the evidence appears to be that many years ago the plaintiff then known as Twin Falls North Side Land and Water Company, organized under the law of Delaware entered into certain contracts with the State of Idaho under the provisions of an Act of Congress known as the "Carey Act" and the laws of Idaho applicable, whereby it agreed to construct certain irrigation works for the irrigation of some 200,000 acres of land now situated in the counties of Jerome, Gooding and Elmore, Idaho, which were then segregated to the State under the Carey Act, and agreed to sell to the [110] settlers upon the lands water rights or shares in the system so to be constructed. The plan and method of procedure for the construction of the system and for selling water contracts and for its completion and operation was that a corporation be formed known as the North Side Canal Company, which is the defendant, with a capital stock of 200,000 shares delivered to the Twin Falls North Side Land and Water Company in consideration of the building by it of the system and which was delivered to it for sale to the settlers under the system. The original purchaser of the water right for a specific tract of land to be reclaimed did enter into a water contract with the Construction Com-

pany in which the company sold to the landowner one share of its capital stock as a water right for each acre of land to be irrigated. Between the year 1907 and 1920, the Construction Company completed the irrigation project and contracted for sale to the landowners of approximately 170,000 shares of water rights, and in 1921 transferred the ownership and operation of the system to the defendant who is now operating the same as the owner.

About November 1, 1907, for the purpose of securing funds with which to construct the system, the Construction Company executed to the American Trust and Savings Bank, as trustee, its deed of trust by which it mortgaged to the trustee all its interest in the system, water rights, franchises and water contracts, then or thereafter to be entered into, and all moneys due or to become due to secure an authorized issue of $5,000,000.00 of bonds. Thereafter the Continental and Commercial Trust and Savings Bank, by merger and change of corporate name, succeeded to all the rights and obligations of the American Trust and Savings Bank as trustee under the mortgage, and assigned contracts. In December, 1927, the Continental and Commercial Trust and Savings Bank, merged and consolidated with the Continental and Commercial National Bank, under the name of the Continental National Savings Bank and Trust Company and thereafter continued to be successor trustee for the bondholders. In the year 1913, [111] and while the

system was uncompleted, and before water had been fully available for the irrigation of all the lands, the Construction Company became insolvent and failed. The individuals then owning the outstanding bonds appointed a bondholder's protective committee who advanced on behalf of the bondholders additional sums of money which was used in the subsequent completion of the system. The committee acting in conjunction with the trustee of the bondholders, took over the management of the Construction Company and all of its property and business, and operated the same until in 1921, when the project was conveyed to the defendant. Subsequent to the execution of the deed of trust the Construction Company deposited as pledged to the trustee for the holders of the bonds all contracts for the sale of water rights or shares in the system which to the extent of the amounts unpaid constituted a lien upon the lands and shares of stock. Upon the default being made of certain water right contracts it was necessary for the trustee to proceed and foreclose the liens, and by reason thereof the trustee in place and stead of the water right contracts certain real property situated in Gooding, Elmore and Jerome Counties, together with the share of stock were purchased under the water contracts. In 1913, when the Twin Falls North Side Canal and Water Company became insolvent, its stockholders owned and were operating a subsidiary corporation known as the Twin Falls North Side Investment Company, whose capital stock was

owned by the Construction Company. At that time the lien of the outstanding bonds was in an amount greater than the value of its assets, and under those circumstances the stockholders of the Construction Company turned over to the Bondholders Committee a majority of the capital stock of the Construction Company and of the Investment Company. Just prior to December 11, 1936, the then trustee for the bondholders, conveyed to the Construction Company all the water right contracts and lands which was part of a plan and method by which all of the assets secured by the deed of trust were to be and [112] were transferred to the bondholders. After that was done the trustee released of record the deed of trust. The Investment Company then became merged into the Construction Company who constituted the surviving corporation which name was changed to the Idaho Farms Company and a new stock issue of the par value of $45.00 each was issued pro rata among the bond holders in exchange for their bonds. By reason of the transfer from the trustee to the Construction Company and the merger, the plaintiff became the owner and in the possession of all the property listed in "Exhibit B" attached to the complaint.

It further appears that by the terms of the State Contract, dated August 21, 1907, the Construction Company was authorized to sell water rights for $35.00 per share, and by the terms of the State Contract dated January 2, 1909, it was authorized to sell water rights for $45.00 per share. Since the

acquisition of the properties by the plaintiff and its respective grantors, they have paid out sums of money for taxes. The bond holders have been reimbursed to the extent of fifty-five per cent of the actual principal sum advanced. From time to time the defendant has levied assessments for maintenance and operating expenses upon the lands and water rights, but we are only concerned in that respect for the years 1935 to 1937 inclusive, which have not been paid. Prior to 1931 the plaintiff paid the annual maintenance assessments levied upon its lands and water rights which the defendant asserts it is now estopped from denying the legality of the liens of the defendant for the years 1935 to 1937 inclusive as the costs covered by the liens were agreed to by Mr. Sheppard who then represented all of the respective grantor companys of the plaintiff, and by so doing the position of the defendant has been changed in having made expenditures and improvements which otherwise it would not have made.

About December 24, 1937, the defendant instituted an action in the State District Court against the plaintiff to [113] foreclose its claim of lien for unpaid assessments levied upon the lands here involved for the years 1935 and 1936, and also on December 24, 1937 instituted a similar suit there for the year 1937 assessments. A number of similar actions were also instituted in the State District Court to foreclose claim of liens of the defendant upon the lands and water rights which the defen-

dant asserts that the present suit should be stayed until the actions in the State Court are there determined. The present suit was filed November 24, 1937, prior to the actions filed in the State District Court involving the assessments for the years 1935 to 1937, inclusive, and subsequent to the other actions.

The present suit being one to quiet title to the lands and water rights of the plaintiff and not to foreclose claim of liens of the plaintiff, there are presented the following questions for solution:

(a) Can a suit to quiet title be maintained under the laws of Idaho where the plaintiff alleges that the defendant claims to have some interest in or claim of lien upon its lands and water rights which it asserts is subject and subordinate to its own claim and title thereto, and by reason of certain pretended assessments levied by the defendant upon its lands and water rights the defendant claims a prior and paramount lien to the claim and title of plaintiff?

The Idaho Statute relating to actions to quiet title, being Sec. 9-401 I C A is broad and authorizes institution of an action to determine adverse claims of interest or liens to lands and water rights, and because the issue as to the priority of the claims of liens are involved would not defeat the right of the plaintiff to have removed from the public records, if tenable, its claim that the claim of lien of the defendant is subordinate to its claim and title in an action to quiet title.

That is the purpose of the statute to remove any adverse claim of whatever nature or cloud upon the title of the [114] plaintiff. The present suit is not one in which there is involved the right or necessity to foreclose a lien of the plaintiff, but one questioning the validity of the claim of lien of the defendant which the plaintiff asserts is subordinate to and invalid as to its interest and title, and the validity and priority of the claims of the parties of any kind would properly be involved. The United States Courts have power and jurisdiction under the issues and facts to determine the relief prayed for.

(b) Do the actions pending in the State District Court abate the present action? It is thought not as the actions there instituted in December, 1937, involving the assessments for the years 1935 to 1937, inclusive were instituted subsequent to the bringing of the present action in November 1937, and therefore the present action should not be abated until the actions involving assessments for other years are determined in some other court, and, finally.

(c) Whether the assessments levied as maintenance charges upon the lands and water rights of the plaintiff were valid, and if so, do the liens thereby created have a priority over the claims of lien and title of the plaintiff, and if not, is the plaintiff now estopped from questioning them by reason of the facts urged by the defendant? This is the principal and controlling question in the case.

The statute under which the defendant claims it

was authorized to levy the assessments is Section 41-1901, I. C. A. which provides:

> "Any corporation heretofore organized or any corporation that shall hereafter be organized for the operation, control or management of an irrigation project or canal system, or for the purpose of furnishing water to its shareholders, and not for profit or hire, the control of which is actually vested in those entitled to the use of the water from such irrigation works for the irrigation of the lands to which the water from such irrigation works is appurtenant, shall have the right to levy and collect from the holders or owners of all land to which the water [115] and water rights belonging to or diverted by said irrigation works are dedicated or appurtenant regardless of whether water is used by such owner or holder, or on or for his land; and also from the holders or owners of all other land who have contracted with such company, corporation or association of persons to furnish water on such lands; regardless of whether such water is used or not from said irrigation works, reasonable tolls, assessments and charges for the purpose of maintaining and operating such irrigation works and conducting the business of such company, corporation or association and meeting the obligations thereof, which tolls, assessments and charges shall be equally and ratably levied and may be based upon the number of shares

> or water rights held or owned by the owner of such land as appurtenant thereto or may be based upon the amount of water used; and such company, corporation or association of persons shall have a first and prior lien, except as to the lien of taxes, upon the land to which such water and water rights are appurtenant, or upon which it is used, said lien to be perfected, maintained and foreclosed in the manner set forth in this chapter; provided, that any right to levy and collect tolls, assessments and charges by any person, company of persons, association or corporation, or the right to a lien for the same, which does or may hereafter otherwise exist, is not impaired by this chapter."

It appears clear from the State statute that the defendant had the right where its system was for the purpose of furnishing water to its shareholders, to levy and collect from the holders or owners of land to which the water and water rights belong, regardless of whether water is used by the owner or not, reasonable assessment and charges for the purpose of maintaining and operating the works and conducting the business of the company or association and meeting the obligations thereof, which assessments and charges shall all be equally and ratably levied and may be based upon the number of shares or water rights held or owned by the owner or may be based upon the amount of water used.

While in the case of Aberdeen-Springfield Canal Co. v. Bahor et al., 36 Idaho 818, 214 Pac. 209, it was held that a party was not liable for maintenance unless the water is delivered, it was where they had contracted not to be liable for the assessment unless request was made for the water or it is delivered. No such contract appears here. So we are now confronted with the contention of the defendant that the assessments during the years 1935 to 1937 inclusive are valid liens upon the property which is not exempt [116] for maintenance and operation charges under the particular facts in the present case. The essential facts out of which this question arises have been referred to, but it may further be stated that when the Construction Company became insolvent there were outstanding $3,770,000.00 of bonds, and then the bondholders' committee was appointed. In lieu of foreclosure of the trust deed, there was turned over to the committee a majority of the capital stock of the Construction Company and all of the capital stock of its subsidiary, the Investment Company. In 1936, the steps were completed whereby in lieu of foreclosure, the bondholders obtained legal title to all the assets mortgaged and pledged under the trust deed. The balance of the stock of the Construction Company was then surrendered for the benefit of the bondholders. The Investment Company having been merged into the Construction Company and ceased to exist, the surviving company being the plaintiff which in connection with those proceedings changed its cor-

porate name to the Idaho Farms Company, and the trust deed was then released. It will be remembered that all of the capital stock of the Construction Company was re-issued to the bondholders, evidencing their proportionate interest in the mortgaged and pledged assets. There are as appearing by "Exhibit 11" listed shares and the lands to which they are appurtenant which the plaintiff asserts it holds—until resale to other settlers—in the same status and under the same conditions as if it had never been sold, which situation arose by reason of default on the purchase contracts by the settlers.

With the facts thus stated we approach the consideration of the legal principles urged by the plaintiff and the defendant.

The plaintiff contending that the case of Brown & Chapin Trustees v. Portneuf-Marsh Valley Canal Company, et al., 274 U. S. 630, 71 L. Ed. 1243, completely controls the issues here presented, and is not distinguishable as it asserts that it "decides and establishes that after as well as before the foreclosure of the [117] settlers' water contracts, a Carey Act Construction Company and its bondholders hold the repossessed property exempt from assessment liens of the operating precisely as it did before the unsuccessful sale to the settlers."

While on the other hand the defendant urges that the Portneuf-Marsh case is distinguishable from the present one in that the property involved here comprises land and water rights acquired by foreclosure of existing settlers' water contracts or by

quitclaim deeds in lieu of foreclosure and the lien of the construction company was terminated, and that the prior claim of lien of the plaintiff had by reason of the steps taken whereby it acquired the legal title to the property before the assessments here involved were levied, there was a merger of the legal and equitable title which extinguished the lien of the mortgage.

Of course, if the issues and facts of the Portneuf-Marsh case are not distinguishable from the present case, the conclusion there reached is binding and decisive of the present case. What then were the status of the parties in the Portneuf-Marsh case as compared with the status of the parties in the present case? It appears clear that in the Portneuf-Marsh case the plaintiffs were trustees for the bondholders of the project and were seeking to foreclose a trust deed given by the Construction Company to the trustees to secure the payment of the bonds, and the usual facts were also alleged and relief prayed for as in ordinary actions to quiet title under the Idaho Statutes. The operating company of the project, as here was made a party defendant.

The question there presented was one of priortity of liens upon shares of stock representing water rights in an irrigation project engaged and created under the Carey Act. The suit was instituted in this Court for the foreclosure of a deed of trust by the trustees. The defendants were the Construction Company and operating company. The Construc-

tion Company entered into a contract with the State for the construction of the irrigation system to supply water to certain arid lands set apart for that purpose by the [118] Federal Government under the Carey Act. The Construction Company under the contract should sell water rights in the system to the settlers. The system, when completed, should be transferred to the operating company in return for its capital stock. Under the contract the interest of the construction company in the system and lands within the project might be mortgaged in accordance with the Carey Act and the statutes of Idaho. Pursuant to the Statutes and the contract, the Construction Company sold water rights to the settlers and delivered to them a like number of shares of stock in the operating company. The interest of the purchasers in the lands and water rights and shares of stock should be security for the deferred installment payments. The operating company had power to levy all necessary tolls, charges and assessments. To finance the project, the Construction Company authorized a bond issue secured by the mortgage on the system. The contracts for the sale of water rights were deposited with the trustee as further security of the bonds. The Construction company defaulted in payment of interest on its bonds, and the suit was brought to foreclose the mortgage and any claims that the two companies might make to the land, water rights and stock. The operating company, as a defense,

set up its ownership of some of the stock in controversy, acquired under a lien alleged to be superior to that of the mortgage which it asserted it was authorized to levy and collect as tolls, charges and assessments to defray the expenses of maintenance and operation of the system. There were two distinct classes of liens created with respect to the stock and water rights, in addition to the general mortgage lien on the whole system. First, The liens for maintenance and operating charges in favor of the operating company, and second, the purchase money liens in favor of the construction company on the stock and water rights on the entrymen land. The Court, when in commenting on the facts there said:

> "Legislation permitting, a scheme for the creation of such a system might undoubtedly provide that liens for maintenance should take precedence over a general mortgage given to finance its construction. Such is the recognized order of priority in admiralty and to a more limited extent in receiverships in equity and in foreclosure proceedings. The trial court stated persuasively the contentions made here that hardship to individuals and danger to the unity and continuity of the system in event [119] of foreclosure, if maintenance charges are not thus given the preference, are considerations which might well turn the scales in favor of that class of liens if the statutes, or the controlling documents in the absence of statutory provision, were silent or ambiguous."

"But we think the statutes here are neither silent nor ambiguous. Reading together the documents embodying the plan of organization, which specifically incorporated the provisions of the statutes, the question may be resolved without exclusive reliance upon implications to be found in the general nature and purpose of the plan itself."

"The Carey Act as amended declares, 'A lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon . . .' This statute is an enabling act, empowering the state to provide for liens by appropriate legislation. The construction of State statutes so enacted, and the status of liens created under them are local questions (Equitable Trust Co. v. Cassia County, 15 Fed. (2d) 955) which, in the absence of controlling authority by the highest court of the state, we must determine for ourselves. Ritsy v. Chicago, R. I. & Pac. Ry. 270 U. S. 378. By the act of the Idaho legislature accepting the benefits of the Carey Act (Sec. 3019 Comp. Stat. 1919) it is provided:

"Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and

land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired."

"The construction company was a company furnishing water within the meaning of the section, and the liens for the deferred payments now asserted by respondents are liens in its favor, authorized by the statute and reserved by its contracts with the purchasers. But it is argued, notwithstanding the broad language of the statute, that its application is limited by the second clause; 'said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land.'' It is insisted, as the District Court held, that by reason of this clause the liens to secure deferred payments do not take priority over the liens for maintenance because the latter are not liens created by the land owners, which alone are subordinated to the purchase contract liens.

"But we think the quoted clause cannot be thus narrowly construed. It is not in terms a limitation on the general language of the sec-

tion but an amplification of it. Its apparent purpose is [120] to make certain that entrymen, in the process of acquiring their lands and making the water rights appurtenant to them, may not by any legal device create liens which shall come ahead of the purchase contract liens given to secure the deferred payments. The clause provides that the authorized liens on the water rights and lands shall have priority over all liens created by the land owners themselves, but that is not equivalent to saying that they shall be prior to no others. It is of course an implied term of every lien statute that the lien authorized is subordinate to liens for taxes. Continental & Commercial Trust & Savings Bank v. Werner, 36 Idaho 601, 602. If the meaning here contended for were given to the statute, liens for the unpaid purchase price would be subject to subsequent materialmen's and mechanics' liens and those of attachment and levy of execution. The statute obviously could not be so interpreted without thwarting its plain purpose and destroying its effective operation.

"Its primary object was to secure the requisite capital for the creation of costly irrigation systems by which arid public lands could be brought under cultivation. It could not have been contemplated that the 'first and prior' liens authorized by the statute to secure the repayment of such capital should be subse-

quent to every other lien which might be placed upon the property except those formally executed by the land owners or that a 'first lien' of that character would attract capital into a new and hazardous enterprise. The concluding clause of the section 'said lien to remain in full force and effect until the last deferred payment . . . is fully paid and satisfied,' can only mean that the liens for purchase money which were first when created, remain so despite maintenance liens which may later come into operation as a result of the non-payment of assessments.

"The provisions of the various instruments for establishing the irrigation system, while not explicit, are entirely consistent with the view which we take of the meaning and effect of the statute. The contract between the two companies provided in substance, as did the by-laws of the operating company specifically (Art. V, Sec. 8) that all shares of stock 'shall be held subject to the rights of' the construction company 'until the amount due such company its successors or assigns, shall have been fully . . . paid, as provided in the contract between said corporation and the purchaser of shares . . .'

"We therefore conclude that the contract liens are superior to the maintenance liens asserted by petitioner, a conclusion which makes it unnecessary for us to consider the validity

of the maintenance liens challenged by respondents."

Portneuf-Marsh Valley Canal Company v. Brown et al. Trustees, 274 U. S. 630, 636, 637, 638, 639, 640.

It will be observed from a study of the opinion of the Supreme Court, the opinions of the trial court and the [121] Court of Appeals, the briefs and record, the nature of the action was the foreclosure of the bonds and prayer that the construction and operating companies set up any interest or claim they may have in and to the properties which were adverse to the stockholders who claimed a prior mortgage line. Also the same Carey Act, statutes of the State, and similar contracts and proceedings were had relative to the status of the properties and parties, and the liens held by the construction company created by sales of water rights, some of which were foreclosed, and the properties acquired through Sheriff's deed, and some by quitclaim deeds given to the construction company in lieu of foreclosure, as involved here. The deeds there were taken in the name of Peabody as agent for the bondholders and their trustees, while here the quitclaim deeds were taken in the name of the Investment Company. The situations are the same. Under those circumstances it was contended by the operating company that the foreclosure proceedings and quitclaim deeds operated to extinguish the Carey Act construction company's lien for construction charges, and that thereafter the property

thus acquired and held became subject to maintenance liens precisely as any other land and water right of the project. The issues presented and decided and the status of the respective parties are identical in every respect, and that being the case the Supreme Court having decided that after as well as before the foreclosure of the settlers' water contracts, a Carey Act construction company and its bondholders hold the repossessed property exempt from assessment liens of the operating company precisely as it did before the unsuccessful sale to the settlers, it is decisive of the present case, unless the plaintiff is estopped by its conduct from maintaining the position which it now takes and have waived its right to invoke the principle recognized by the Supreme Court exempting its property from maintenance and operating charges. The Court did not there regard under such circumstances that there was a merger of the legal and equitable title, or a change of situation of the parties, but recognized the priority of the lien of the general [122] mortgage and reached that conclusion. One would reason from the conclusion there stated and reached by the Supreme Court exempting the property and water rights from maintenance and operating charges that such exemption would cease to exist when the full amount of the bonds are satisfied.

The doctrine of estoppel is invoked by the defendant as it asserts that the evidence discloses that the plaintiff and its agents paid maintenance assessments upon the properties up to and includ-

ing the year 1931, and that Mr. Sheppard, who was the general manager of the defendant and the manager of the Land and Water Company and of the Investment Company, and representative of the Bondholders' committee looked after all their interests and managed those companies which were finally merged in the plaintiff and that he participated in the preparation of the defendant's budget and recommended certain improvements should be made on the system and the purchase of storage and other water rights.

Since 1931 the plaintiff has paid no maintenance assessments upon the property, and no water was delivered or used upon the lands involved.

The defendant was required under the law to spread the assessments ratably over all the lands of the project regardless of the contention of the plaintiff and until its liability was ultimately determined. Applying then the doctrine of equitable estopple as recognized by the Supreme Court of the State and which is the general rule; "In order to apply the principle of equitable estopple it is essential that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself ignorant of the facts in question, and also without any convenient and available means of acquiring such knowledge. Where the facts are known to both have the same facilities for ascertaining the truth, there can be no estopple" Chaoon v. Seger, 31 Idaho 101, 168 Pac. 441. Johansen v. Looney 31 Idaho 754, 176 Pac. 778. There must be a false representation or concealment of material

facts to one without knowledge. Sullivan v. Mabey 45 Idaho 595. A misconstruction of the legal effects of acts where [123] the parties stand on equal terms cannot be a basis of an equitable estopple. National Surety Co., v. Craig et al., 220 Pac. 943.

It is further urged by the defendant that the plaintiff has abandoned its right to water for the lands in question and bases its contention on the fact that there has been a failure for more than five years to apply the water rights to plaintiff's lands. The evidence shows that the water appurtenant to the lands has at all times been used by the defendant on lands within its system under irrigation and to which the defendant has been delivering water which would not create any abandonment or forfeiture of the right, Joyce et al., v. Murphy Land and Irrigation Company et al. 35 Idaho 549, 208 Pac. 241; In The Matter Of Appeal From The Department Of Reclamation Of The State of Idaho, In re. transfer of water rights of Enoch et al. 50 Idaho 573, 300 Pac. 492.

The five year term statute of the State being Section 41-216 I. C. A. provides that when such right is lost through non-use it shall revert to the State and be again subject to appropriation. The statute does not provide that in case a given water right be not used on any land to which it belongs, the right shall be lost, as it merely provides that the right shall be lost when it is not used at all. The water right appurtenant to the plaintiff's land is but a part of the entire water right and was appropriated by the Twin Falls North Side Land

and Water Company for use on all of the entire North Side Project, and there has been no failure to apply it to a beneficial use for the irrigation of the entire project. The statute was not intended to apply to settlers within a Carey Act project who were not themselves the appropriators of the water from the public stream of the state. One would assume that the defendant is not interested in having the water revert to the state but are in hope of having the water abandoned to it so that it can become the owner therof which the law does not recognize. Watts et al. v. Spencer et al 49 Pac 39. [124]

If no public interest is favored by the abandonment, equity is against declaring a forfeiture. It is a question of intention and must be evidenced by a clear and decisive act. Hurst v. Idaho-Iowa Lateral and Reservoir Company et al. 42 Idaho 436, 246 Pac. 23; Sullivan Construction Company v. Twin Falls Amusement Company 44 Idaho 520, 258 Pac. 529; St. John Irrigation Company v. Danforth et al. 50 Idaho 513, 298 Pac. 365; Union Grain & Elevator Company v. McCammon Ditch Company 41 Idaho 216, 240 Pac. 443.

The evidence is lacking in proof of any intention of the plaintiff to abandon its water right. The relationship of the parties were of a fiduciary nature and the defendant cannot properly urge that the water rights in question has passed to it. They do not hold adversely against the other as a trust relationship exists and their own right is an interest in common. 65 C. J. Sections 277, 278.

No controversy exists here between prior and subsequent appropriations on the river.

Lastly, it is urged that the defendant has an equitable lien for the maintenance assessments. Under the evidence there is no proper basis for such a contention. The lands in controversy were not irrigated and received no water from the system during the years for which maintenance assessments are claimed. Certain improvements were made on the system since the defendant acquired it which were outside the ordinary expense of delivery of water and maintenance of the system. No evidence appears showing the amount of such improvements done in the aggregate during the entire three year period in question, as the evidence shows that during a period extending over approximately ten years the defendant has engaged in making improvements and that in 1935 it acquired 20,000 acre feet of additional capacity in the American Falls Reservoir. The defendant and its stockholders have for many years used the water represented by the stock in controversy [125] which was a benefit derived by them and has from the status of the plaintiff's property and the large amount paid in previous years, derived advantages far in excess of any equitable benefits conferred. A consideration of the record and opinions of the courts in the Portneuf-Marsh case the equitable lien aspect of the controversy was considered and disposed of, and it was there asserted that large sums of money had been expended in the improvement of the system. It would be stretching the imagination to say that

under the evidence the equities are in favor of the defendant. So the contention that the plaintiff had abandoned its water right is not tenable under the evidence.

In view of the conclusions thus reached the relief prayed for in plaintiff's complaint must be granted with costs.

[Endorsed]: Filed May 25, 1938. [126]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that North Side Canal Company, Limited, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 27th day of June, 1938, and from the whole thereof.

Dated this 26th day of September, 1938.

WAYNE A. BARCLAY,
Residence: Jerome, Idaho,
J. H. BLANDFORD,
FRANK L. STEPHAN,
Residence: Twin Falls, Idaho,
RICHARDS & HAGA,
Residence: Boise, Idaho,
Attorneys forAppellant,
North Side Canal Company,
Limited.

[Endorsed]: Filed September 26, 1938. [127]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To W. D. McReynolds, Clerk of the Above Entitled Court:

You Will Please Prepare the record upon the appeal taken by the undersigned in the above entitled cause from the decree entered therein on the 27th day of June, 1938, and the undersigned designates the following as the portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Plaintiff's complaint, omitting Exhibit B thereto attached, for the reason that so far as said exhibit is material on appeal, it is included in Exhibit 1 attached to the findings of fact and conclusions of law; in lieu thereof you will simply state "Exhibit B omitted at appellant's request".

2. Defendant's answer, omitting therefrom Exhibit A attached to defendant's Exhibit 2, the same being a description of the lands referred to in said Exhibit 2; omit defendant's Exhibits 3, 4, 5 and 6, as the court has found that the assessments therein described were legally levied and assessed; include Exhibit 7 of defendant's answer, except verification, and in lieu of the verification simply state "duly verified"; omit Exhibit 8, same being lis pen-

dens; omit Exhibit 9 as the same is similar to Exhibit 7, except as to the names of the defendants, which are Continental and Commercial Trust and Savings Bank, a corporation, Idaho Farms Company, a corporation, and Continental National Bank and Trust Company of Chicago, a corporation, and the description of the land; omit Exhibit 10 as the same is the lis pendens filed in connection with the suit referred to in Exhibit 9. [128]

3. The findings of fact and conclusions of law.

4. Decree.

5. Opinion of the court.

6. Notice of appeal, showing date of filing.

7. Designations as to the matter to be included in the record.

8. Statement by appellant of the points on which it intends to rely.

9. Appellant's condensed statement in narrative form of the testimony.

In preparing the above record, you will please omit the title of all pleadings filed in this cause, except to the complaint, and insert in lieu thereof "Title of Court and Cause" followed by the name of the pleading or instrument. You will also omit the verifications and note in lieu thereof "duly verified" if the instrument be verified. You will also omit the acknowledgment of service on all pleadings and other documents.

Dated September 26, 1938.

WAYNE A. BARCLAY,
Residing at Jerome, Idaho,
FRANK L. STEPHAN,
J. H. BLANDFORD,
Residing at Twin Falls, Idaho,
RICHARDS & HAGA,
Residing at Boise, Idaho,
Attorneys for Appellant,
North Side Canal Company,
Limited.

[Service accepted.]

[Endorsed]: Filed Sept. 26, 1938. [129]

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

To Edwin Snow, Esq. and A. F. James, Esq., Attorneys of Record for Idaho Farms Company, Appellee in the Above Entitled Cause:

The appellant, North Side Canal Company, Limited, submits the following concise statement of the points upon which it intends to rely on its appeal herein.

I.

That the district court erred in finding, concluding and decreeing:

(a) That plaintiff had any lien whatsoever under Section 41-1726, Idaho Code Annotated, 1932, on the lands in question.

(b) That there had not been a merger of whatever lien plaintiff or its predecessors in interest ever had under said Section 41-1726, and the legal title to the lands and water rights in question.

(c) That plaintiff's said lands and water rights were exempt from assessments levied by defendant during the years 1935 to 1937, inclusive, and any levy in subsequent years under Chapter 19, Title 41 (Secs. 41-1901 to 41-1910). [130]

(d) That any lien defendant may have or acquire under Chapter 19, Title 41, Idaho Code Annotated, upon plaintiff's lands and water rights, is and will be subsequent, subject and subordinate to plaintiff's right, title and interest in said lands and water rights.

(e) That plaintiff's right, title or interest in said lands and water rights is enlarged or of greater dignity or legal effect by reason of the fact that its stockholders were formerly owners of bonds issued by Twin Falls North Side Land and Water Company, or because such stockholders, or any of them, furnished funds for the construction of said irrigation system or because they have been repaid only 55% of the amount paid for such bonds, or the amount loaned or advanced to the company.

(f) That plaintiff's acquiescence for nearly 25 years in the right of defendant to levy assessments against the lands and water rights here in question, and to make such assessments a lien thereon prior and superior to plaintiff's lien, right, title and interest, had not created an estoppel against plaintiff or waived plaintiff's right to now contend that defendant's lien under Chapter 19, Title 41, was subject and subordinate to plaintiff's lien on, and its right, title and interest in such lands and water rights.

(g) That the action and conduct of plaintiff and its officers and manager, in paying assessments levied by defendant and recognizing defendant's right to levy assessments against plaintiff's lands and water rights and in urging defendant to make costly enlargements and improvements on its irrigation system and to acquire additional water rights, do not estop plaintiff from now claiming that its lands and water rights were exempt from the payment of assessments levied by defendant to pay for such improvement and water rights, and that the amount expended by defendant for such enlargements and improvements and additional water rights could not be determined from the evidence. [131]

(h) That plaintiff was not required to pay its prorata share of the improvements made by defendant on its irrigation system and for the purchase and rental of water rights made for the benefit of its stockholders.

(i) That the defendant and its stockholders had used water appurtenant to plaintiff's lands when not used by plaintiff, and that such use would offset the amount due under the assessments levied by and against plaintiff's lands for maintaining and operating the irrigation system and for the improvements and enlargements made thereon and for the purchase of additional water rights.

(j) That plaintiff and its predecessors in interest had constructed said irrigation system in accordance with the provisions of the state contracts relative to the construction thereof and had provided the amount of water required to be furnished to the settlers under the state and settlers' contracts, and that the shortage of water under said irrigation system was not due to any wrongful act, failure or neglect of plaintiff and its predecessors in interest.

(k) That plaintiff's failure to use any water on the lands in question for more than five years or since such lands were acquired by plaintiff, did not constitute an abandonment of plaintiff's water rights for said lands.

(l) That defendant had not commenced an action in a proper court to enforce or foreclose the liens claimed by defendant for assesments levied for maintenance and operating expenses during the years 1935 and 1936, and that because thereof defendant no longer had any lien for the assessment levied during the year 1935.

II.

That the district court erred in not finding, concluding and decreeing: [132]

(a) That the questions controversies and issues raised in this suit are the same questions, controversies and issues raised in suits that were pending in the State District Courts in actions between plaintiff and defendant brought prior to the commencement of this suit in the Federal court and that by reason thereof this suit could have been prosecuted in the Federal court but should either have been dismissed or the prosecution thereof abated, pending the trial and conclusion of the prior actions brought in the State court.

(b) That this was a suit to quiet title and not a suit to determine the relative priority of liens held by plaintiff and defendant respectively.

(c) That there has been a merger of the legal title and the equitable title or lien at one time held by the plaintiff and its predecessors in interest on the lands and water rights in question.

III.

That the district court erred in overruling defendant's objections to evidence offered by plaintiff, as follows; and to which rulings exceptions were allowed defendant:

(a) Objections to plaintiff's Exhibit No. 11 and particularly to the statements thereon showing the amount due plaintiff at the time deed was taken to the land and premises in question and to the amount of taxes paid thereon.

(b) Objection to plaintiff's Exhibit No. 40, being the judgment roll in the case of Kassens v. Twin Falls North Side Land and Water Company, et al.

(c) Objections to evidence offered by plaintiff in substance to the effect that the water appurtenant to plaintiff's lands had for several years been used upon other lands under defendant's project and by defendant's stockholders. [133]

(d) Evidence in substance to the effect that plaintiff had not been fully reimbursed for the costs of constructing the irrigation works and reclaiming the several subdivisions of land involved in this action.

IV.

That the court erred in refusing to admit evidence offered by defendant on the following points and to which rulings exceptions were allowed defendant:

(a) In refusing to admit evidence (Exhibits 33 and 34, and other evidence) that on or about December 24, 1937, actions were commenced by defendant in the District Courts of the State of Idaho in Jerome and Gooding Counties to foreclose the lien of assessments levied during the years 1935 and 1936.

(b) In refusing to admit in evidence defendant's Exhibit 38, being a letter dated October 23, 1925, addressed to Messrs. Walters & Parry at Twin Falls, Idaho, by the defendant's secretary, relative to the payment of maintenance on lands

owned by plaintiff, and Exhibit No. 39, being the instructions received on or about October 30, 1925, from Judge Walters, Attorney for plaintiff and its predecessors in interest, as to the payment of such maintenance.

(c) In refusing to admit evidence that additional improvements are and will be required on its irrigation system.

V.

That the findings, conclusions of law and decree herein are indefinite and uncertain and make no adequate provision for the protection of defendant's rights and the enforcement of its lien under Chapter 19, Title 41, Idaho Code Annotated. [134]

VI.

That the decision is against law.

Dated this 26th day of September, 1938.

WAYNE A. BARCLAY,
Residing at Jerome, Idaho,
FRANK L. STEPHAN,
J. H. BLANDFORD,
Residing at Twin Falls, Idaho,
RICHARDS & HAGA,
Residing at Boise, Idaho,
Attorneys for Defendant and Appellant, North Side Canal Company, Limited.

[Service accepted.]

[Endorsed]: Filed Sept. 26, 1938. [135]

[Title of District Court and Cause.]

CONDENSED STATEMENT IN NARRATIVE FORM PREPARED UNDER RULE 75 OF THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES FOR USE ON DEFENDANT'S APPEAL.

This Cause Came regularly on for trial on the 14th day of April, 1938, at Boise, Idaho, before the Honorable Charles C. Cavanah, District Judge, sitting without a jury. Edwin Snow, Esquire, of Boise, and A. F. James, Esquire, of Gooding, appeared as attorneys for plaintiff. Wayne A. Barclay, Esquire, of Jerome, Frank L. Stephan, Esquire, of Twin Falls, and Oliver O. Haga of Richards & Haga, Boise, appeared for defendant.

R. P. PARRY,

a witness on behalf of plaintiff, testified as follows:

(Direct examination)

"My name is R. P. Parry. I am a lawyer, and live at Twin Falls. I have been engaged in the practice of law 17 years, 16 years at Twin Falls and prior to that in Jerome.

"Since December 11, 1936 I have been vice president and treasurer of the plaintiff company. Since 1919, up until that time, I was employed as attorney by the Bondholders' Committee, and represented the Twin Falls North Side Land and Water

(Testimony of R. P. Parry.)

Company, which was plaintiff under its former corporate name, in connection with what is known as the North Side Project. It comprises somewhat less than a fourth interest in the capacity of the Jackson Lake Reservoir in Wyoming, an interest in the Milner Dam on Snake River where the water is diverted, the diversion works in the river, and the canal system consisting of approximately 100 miles in an easterly direction from Snake River on the north side, [136] with about 900 miles of main canals and laterals, not including farm ditches.

"The System serves all of the irrigated part of Jerome County and a substantial part—I think the southern half—of Gooding County, and a part of Elmore County. Since 1933, by decrees of this court and other courts, the size of the project has been fixed at 170,000 shares of stock in the defendant company, which represents a like number of acres entitled to water.

"I have with me some exhibits in the case. Exhibit 1 is an agreement between the State of Idaho and the plaintiff under its former name, which for brevity we will call the Land and Water Company. It is dated April 15, 1907, and is a so-called State Contract covering the first segregation of that project.

"Exhibit No. 2 is a similar contract, dated August 21, 1907, covering the second segregation of the project.

(Testimony of R. P. Parry.)

"Exhibit No. 3 is a similar contract, dated January 2, 1909, covering the third segregation of the project.

"Exhibit No. 4 is a specimen or typical contract between the Land and Water Company and the settlers. It is the form prescribed by the State of Idaho and used on the second segregation.

"Exhibit No. 5 is a similar contract, and is the form used on the third segregation. The difference between Nos. 4 and 5 is that on the third segregation the water right was one-hundredth of a cubic foot per second, and on the second it was one-eightieth. The original price on the second segregation was $35.00 an acre, and on the third segregation $45.00."

The witness then testifies that he is acquainted with the list of land involved in this action, and described in Exhibit No. 1 attached to the court's findings, and that Exhibits Nos. 4 and 5 are the forms of contracts used in the sale of water rights for these lands. He testifies that substantially all of the lands are located on the second and third segregations, the major portion on the second segregation. [137]

"Exhibit No. 6 is the form of stock certificate sold for and used for lands on the second segregation. No. 7 is the form sold for and used on the third segregation." (The certificates referred to are of the form set out in Exhibit A to the complaint, and differ only in this: That the certificates for the second segregation provided that the stock-

(Testimony of R. P. Parry.)

holder was entitled to one-eightieth of a cubic foot of water per second for each share of stock, and on the third segregation to one-hundredth of a cubic foot per second.)

"Exhibit No. 8 is the By-laws of the defendant company, with amendments made from time to time.

"Exhibit No. 9 is a certified copy of the Trust Deed between the Land and Water Company and the American Trust and Savings Bank, Trustee, dated November 1, 1907. The name of the corporate trustee has been changed. In 1910, by merger with other banks, its name became Continental Commercial Trust & Savings Bank. In 1928, by other consolidations, its name was changed again to Continental Commercial National Bank & Trust Company of Chicago. The corporate trustee was the same Illinois corporation carrying on under different names and at all times since 1908 has been qualified to do busines in Idaho.

"Twin Falls North Side Land and Water Company, up to the time when its corporate name was changed, was at all times a Delaware corporation authorized and qualified to do business in Idaho.

"When I first became acquainted with the project in 1919, it had not been entirely completed and had not been accepted by the State of Idaho. Exhibit No. 10 is an order dated August 6, 1920, by the Department of Reclamation of the State of Idaho, accepting the North Side project as completed under contracts with the State of Idaho.

[138]

(Testimony of R. P. Parry.)

Whereupon, Exhibits 1 to 10 inclusive were offered in evidence by plaintiff and admitted.

Exhibit 1 is state contract dated April 15, 1907. Among other things it provides:

PLAINTIFF'S EXHIBIT 1

"Applications for Lands. 6. * * * The second party stipulates and agrees that to the extent of the capacity of the irrigation works and to the extent of its water rights, as rapidly as lands are open for entry and settlement, it will sell or contract to sell water rights or shares for land to be filed upon to qualified entrymen or purchasers without preference or partiality, other than that based upon priority of application, it being understood, however, that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal as against subsequent purchasers, but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system. The priority of the application upon the opening days shall be determined by a system of drawing under the direction of the State Board of Land Commissioners.

* * * * * * *

(Testimony of R. P. Parry.)

"Price of Water Rights. 8. Said party of the second part further agrees and undertakes that it will sell or cause to be sold to the person or persons filing upon any of the lands herein described, or to the owner of other lands not described herein but which are or may be susceptible of irrigation from its canal system, by good and sufficient contract of sale with right of possession and enjoyment by the purchaser pending its fulfillment, a water right or share in said canal for each and every acre filed upon or purchased from the State or acquired from the United States. Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-eightieth (1-80) of one (1) second foot per acre, and each share or water right sold or contracted, as herein provided, shall also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal. Said canal, however, is to be built in accordance with the plans heretofore filed with the Board, which canal, according to said plans, [139] "has been determined by the State Engineer to have the carrying capacity hereinbefore mentioned. Such water rights or shares shall be sold to the person or persons aforesaid for lands under or adjacent to the First Segregation or included therein as follows: * * *

(Testimony of R. P. Parry.)

"One-fifth (1-5) in cash at the time of the sale, and the remainder in five equal annual installments, bearing interest at the rate of six per cent (6 per cent) per annum, payable annually;

* * * * * * *

"This agreement shall not, however, be construed to prevent the sale of shares or water rights to purchasers on terms more favorable than those herein provided, or to prevent the payment of installments on purchase price in advance of maturity of the same at the option of the purchaser. But in no case shall water rights or shares be dedicated to any lands aforementioned or sold beyond the carrying capacity of the canal or in excess of the appropriation of water therefor.

"Transfer of Possession and Management of Canal. 9. It being necessary to provide a convenient method of transferring the ownership and control of said canal from the said party of the second part herein to the purchasers of said water rights in said canal and for determining their rights among themselves and between said purchasers and the party of the second part herein, for the purpose of operating and maintaining said canal during the period of construction and afterwards and for the purpose of levying and collecting tolls, charges and assessments for the carrying on and maintenance of said canal and the management and

(Testimony of R. P. Parry.)

operation thereof, it is hereby provided that as soon as said lands are ordered thrown open for settlement, a corporation, to be known as the North Side Canal Company, Limited, shall be formed at the expense of the party of the second part, the Articles of Incorporation of said Company to be in the form which is hereto attached and made a part hereof; that the authorized capital stock of said corporation shall be Two Hundred Thousand (200,000) shares, which amount is intended to represent one share for each acre of land which may hereafter be irrigated from said canal. The entire authorized amount of the capital stock of said corporation shall be delivered to the party of the second part herein in consideration of the [140] covenants and agreements herein contained in order to enable it to deliver to purchasers of water rights the shares of stock representing the same. Said shares of stock, however, shall have no voting power, and shall not have force and effect until they have been sold or contracted to be sold to purchasers of land under this irrigation system.

"At the time of the purchase of any water right there shall be issued to the purchaser thereof one share of the capital stock of said corporation for each acre of land entered or filed upon. That the said party of the second part herein shall, in case said water rights or

(Testimony of R. P. Parry.)

shares of stock are not fully paid for, require the endorsement and delivery to it of said stock, and shall at the same time, require of said purchaser an agreement that until thirty-five per cent (35 per cent) of the purchase price of said stock has been paid the said party of the second part herein shall vote said stock in such manner as it may deem proper at all meetings of the stockholders of said corporation.

"But the said second party hereto nor the North Side Canal Company, Limited, cannot in any manner control any of the said system so as to limit the liability of the said second party under the terms of this contract.

"The said North Side Canal Company, Limited, shall have the management, ownership and control, as above set out, of the said canal system as fast as the same is completed and turned over to it for operation by the said party of the second part, as hereinafter provided. Whenever it is certified by the Chief Engineer of the Company and the State Engineer that certain portions of the said canal are completed for the purposes of operation, the same may, with the consent of the State Land Board, be turned over to the North Side Canal Company, Limited, for operation. Such transfer and operation, however, shall not in any manner lessen the responsibility of the said second party with reference to the terms of this contract, nor shall such consent upon the part of the State Land

(Testimony of R. P. Parry.)

Board be construed as a final acceptance of such portion of such canal, it being always understood that the acceptance of said canal must be in its entirety and that the bond given for the faithful performance of the said contract must be made and be liable for the substantial completion of the entire canal system.

"Water Right Dedicated. 10. The certificates of shares of stock of the North Side Canal Company, Limited, shall be made to indicate and define the interest thereby represented in the said system, [141] to-wit: A water right of one eightieth (1-80) of a cubic foot per second for each acre and a proportionate interest in said canal, and shares based upon the number of shares ultimately sold therein. * * * The sale of the water rights to the purchaser shall be a dedication of the water to the lands to which the same is to be applied, such water right to be a part of and to relate to the water right belonging to said irrigation system.

* * * * * * *

"Estimated Cost. 15. The estimated cost of the proposed irrigation works is Three Million Dollars, ($3,000,000) and upwards, and the price at which water rights are fixed herein and for which liens are authorized against the separate legal subdivisions of land herein described are deemed necessary in order to pay the costs

(Testimony of R. P. Parry.)

and expenses of reclamation and interest thereon.

"The existing laws under which this contract is made are understood and agreed to be a part of this contract.

* * * * * * *

"Mortgage. The right, title and interest of the second party in the works and irrigation system may be mortgaged, the form of such mortgage to be approved by the Attorney General of Idaho.

"Amendments. This contract may be altered and amended by first party with the consent of second party for the purpose of carrying out the object of this contract, and for the purpose of meeting any conditions now unforeseen."

EXHIBITS 2 AND 3: (Substantially similar to Exhibit No. 1, except that the price of water rights on the second segregation is $35.00 per acre and on the third segregation is $45.00.)

EXHIBIT 4: Settler's contract. (Copy attached to the complaint as Exhibit A.)

EXHIBIT 5: Settler's contract for third segregation. (Similar to Exhibit A attached to complaint, except it provides for one-hundredth instead of one eightieth of a cubic foot of water per second for each acre of land.

(Testimony of R. P. Parry.)

EXHIBITS 6 AND 7: Form of stock certificates. (Similar to form set out in Exhibit A to plaintiff's complaint, except that No. 7 provides for one-hundredth of a cubic foot of water per second.)

EXHIBIT 8: By-laws of defendant canal company. The following constitute the provisions of the By-laws deemed material on this appeal: [142]

PLAINTIFF'S EXHIBIT 8

Article III, Section 11, as amended, provides as follows:

> "Article III, Section 11. It shall be the duty of the Board of Directors at its regular meeting in February of each year to ascertain and determine the amount of money necessary for the transaction and conduct of the Corporation business and the payment of its outstanding maturing obligations and for such other purposes as may have been specially authorized at any previous meeting of its Stockholders, all as may be required for the twelve months period commencing on the first day of the following April.
>
> "The Board of Directors may include in the charges of maintenance and operation above specified an amount for sinking fund to cover future repairs and alterations of the canal system and to provide for the payment of its debts and obligations.
>
> "The Board of Directors shall thereupon determine as nearly as may be the number of

(Testimony of R. P. Parry.)

shares liable to a maintenance charge for such period and shall apportion the total charge to such total number of shares and determine in cents per acre or per share, the maintenance charge for such period, and the same shall constitute the maintenance charge therefor.

"Thereupon the Board of Directors shall cause notice of such assessment to be published for two weeks in each weekly newspaper of general circulation published on said North Side Project.

"The assessment so made shall be due and payable at the office of the Company in Jerome, Idaho, on the first day of April following. All assessments not paid when due shall draw interest and payment thereof may be enforced as provided by the laws of the State of Idaho.

"No water shall be delivered to any contract holder or stockholder until all current assessments have been paid, provided, however, that the Board of Directors may waive the enforcement of this provision in any given year. No stock shall be transferred on the books of the Company until all past due and unpaid assessments on the same or any portion thereof are paid."

Article X, Section 5, reads as follows:

"All the stock of this Corporation shall be issued to and held by the Twin Falls North Side Land and Water Company, its successors or

(Testimony of R. P. Parry.)

assigns, in order to enable it to deliver shares of stock to purchasers of water rights, but said shares of stock shall have no voting power and shall not have [143] force and effect and shall not be assessable for any purpose either for maintenance or otherwise, until they have been sold or contracted to be sold to entrymen or owners of land under the irrigation system, and all assessments, maintenance and other charges must be paid by the purchaser or owner of the stock and not by the Twin Falls North Side Land and Water Company, its successors or assigns."

EXHIBIT 9—Mortgage or deed of trust, dated November 1, 1907, securing bonds to the authorized amount of $5,000,000.00. Under the trust deed the Twin Falls North Side Land and Water Company granted and conveyed to the Trustee as security for said bonds all its right, title and interest in and to the irrigation system, reservoirs and structures constructed and to be constructed, and all water rights acquired for use in connection therewith,

PLAINTIFF'S EXHIBIT 9

"Also, all the rights, grants, interests, privileges, easements and franchises acquired by the Company under said contracts, dated April the 15th, 1907, and August the 21st, 1907, between

the State of Idaho, through the State Board of Land Commissioners of said State and Twin Falls North Side Land and Water Company.

"The property, rights and franchises hereinbefore described and granted unto the Trustee, under the terms of this mortgage, are granted and conveyed unto said Trustee subject to the provisions as to the transfer of possession and management thereof, as set forth in Section 9 of the contracts between the State of Idaho and the Company, dated April the 15th, 1907, and August 21st, 1907.

"And all such notes, contracts and mortgages now owned, or which may be hereafter acquired by the Company, in consideration of the sale, or agreement for sale, of water rights to the owners and claimants of land subject to irrigation under its present or future irrigating works, as shall be assigned in writing by the Company, and be deposited with the Trustee hereunder in accordance with the provisions hereof, and all such notes, contracts or mortgages of the Twin Falls North Side Investment Company, Limited, as shall be assigned in writing and deposited with the Trustee in accordance with the provisions hereof, [144] it being the intent to subject to the lien, either legal or equitable hereof, only such notes, contracts and mortgages as shall be hereafter specifically assigned in writing to and deposited with the Trustee aforesaid.

(Testimony of R. P. Parry.)

"This mortgage is made subject to all the provisions of the contracts between the State of Idaho, through its State Board of Land Commissioners and the Company, dated April the 15th, 1907, and August 21st, 1907, and the provisions of the Act of Congress known as the Carey Act, and the Acts amendatory thereof, and the laws of the State of Idaho accepting the terms of the Carey Act. And is also subject to the provisions of the contracts between the United States of America and the State of Idaho segregating the Carey Act Lands referred to therein."

The trust deed further provides (Article II., page 18):

"The Company covenants with the Trustee, and with the holders of the bonds issued hereunder:

"First: That the lien of this mortgage or Deed of Trust is a first and prior lien upon all the property and franchises hereinbefore described and granted, but it is distinctly understood and agreed that no lien is created upon any of the said notes, contracts or mortgages above referred to until and unless the same shall be hereafter assigned to and deposited with the Trustee as hereinbefore provided. That it will duly perform and punctually cause to be kept and performed each and every term and agreement by it to be kept and performed

(Testimony of R. P. Parry.)

in the contracts with the State of Idaho, and with the United States, for the construction of its canal and irrigation system, and that it will duly and punctually perform each and every of its contracts with any settler or other person for the furnishing or supplying of water from its said irrigation and reservoir system. That it will allow no lien to be created or to be filed upon any portion of its said irrigation system, and that it will at all times keep and [145] preserve the lien of this mortgage or Deed of Trust as the first, prior and only lien upon each and every part of its real and personal property hereinbefore described and granted, upon which a lien is hereby created, and upon the said notes, contracts and mortgages assigned to and deposited with the Trustee as herein provided, and duly perform every duty imposed upon it by law, in such manner that the prior lien of this mortgage or Deed of Trust shall never be displaced or endangered.

* * * * * * *

"Fifth. That the par value of the notes, contracts and mortgages which it shall from time to time assign to and deposit with the Trustee for the purpose of securing the principal and interest of the bonds to be issued hereunder, together with the cash receipts therefrom, in the hands of the Trustee, shall at all times be equal to one and one-fourth times the par value of the

(Testimony of R. P. Parry.)

bonds outstanding, that the said notes, contracts and mortgages so deposited shall be duly assigned to the Trustee, by a good and proper written assignment, duly acknowledged and recorded in the proper county, that the Company will without expense or charge to the Trustee or bondholders, collect and remit to the Trustee, as they severally become due, each and every installment of principal and interest due on the notes, contracts and mortgages so assigned and deposited, that the Trustee shall have the right to collect, and if it deems best, to enforce the collection of such notes, contracts and mortgages.

"Provided, However, that the Company may at any time substitute in lieu of any of said notes, contracts or mortgages a like amount in par value of other notes, contracts and mortgages of the same character, which shall be duly acknowledged, recorded and assigned, and due notice of the assignment given, accepted or waived as hereinbefore provided. And Provided Further, that the Company, shall have the right to repurchase at any time from said Trustee at the par or face value thereof with accrued interest to date of purchase, any of such notes, contracts and mortgages. [146]

"The Trustee shall upon demand, and after the payment of such note or notes, contract or contracts and mortgage or mortgages, make, execute and deliver a full and complete release

(Testimony of R. P. Parry.)

and satisfaction to such purchaser for the amount of the water right, shares of stock, land, or interest held in said irrigation system, or lands of the Twin Falls North Side Investment Company, Limited, by such purchaser for the benefit of the land or lands upon which the said notes, contracts and mortgages operated as a lien.

"In case the Trustee should enforce the collection of any of said notes, contracts or mortgages by legal proceedings as hereinbefore provided, and thereby procure a sale of the water rights or lands securing the same, the Trustee may, if it deem best in the interest of the bondholders to do so, bid for and purchase such property at such sale, at a price not exceeding the amount due the Trustee, plus interest, costs, and expenses of the proceedings, and the certificate of purchase so obtained by the Trustee, or the title to the water rights or lands, if such sale results in the Trustee obtaining title thereto, may be sold by the Trustee at such price, and on such terms as to the Trustee may seem meet and proper, without making any demands upon the Company, or giving the Company any notice of the intention of the Trustee to make such sale."

(Testimony of R. P. Parry.)

PLAINTIFF'S EXHIBIT No. 10

is order made by W. G. Swendsen, Commissioner of Reclamation, of the Department of Reclamation of the State of Idaho, on August 6, 1920 accepting as completed the irrigation works to be constructed under the said state contracts (Exhibits 1, 2 and 3), and provides among other things that the said Commissioner of Reclamation

> "acting for and in behalf of the State of Idaho, and for and on behalf of the North Side Canal Company, Limited, and on behalf of the stockholders thereof, does hereby accept in behalf of the State of Idaho, North Side Canal Company, Limited, and its stockholders, and North Side Pumping Company and its stockholders, the irrigation system as the same is now constructed by Twin Falls North Side Land and Water Company as a full and complete performance of the three contracts between the Construction Company and the State of Idaho. (Plaintiff's Exhibits 1, 2 and 3.) * * * This order is made only for the purpose of accepting as completed the physical properties of the [147] irrigation works as now built and constructed by Twin Falls North Side Land and Water Company, and such acceptance is based upon a present carrying capacity of the irrigation works as now constructed and operated, sufficient to serve or irrigate at least 170,000 acres of land, and in

(Testimony of R. P. Parry.)

the event water stock or water rights in said irrigation system are hereafter sold by Twin Falls North Side Land and Water Company by order of a court or otherwise, in excess of 170,000 shares, Twin Falls North Side Land and Water Company, or its successors, shall be required at their own expense to perform such work as may be necessary in increasing the capacity of said irrigation system, if this is necessary, by enlargement sufficient to provide a safe carrying capacity for such additional water rights as may be sold in addition to 170,000 shares."

Mr. Parry, continuing, testified further as follows:

"Substantially all of the settlers' Carey Act water contracts were pledged and held by the Trustee Bank in Chicago. There were a few scattered contracts in the possession of the Land and Water Company itself, not assigned to the Trustee. The great bulk of the water contracts which were paid out in the earlier years and in the manner provided, I had nothing particularly to do with personally; but the others which resulted in this group of land involved in this suit, that is, the legal determination under the foreclosure, and the checking of the titles and taking them in lieu of foreclosure, I had a great deal to do with. I am familiar with the land covered by the contracts. The plaintiff, Idaho Farms Com-

(Testimony of R. P. Parry.)

pany, is in possession of this land. It has been in possession from the time that the lands were acquired up to the present time, that is, when they were acquired by the company, up to the present time, going back as far as my knowledge goes, to 1919." [148]

The witness explained in considerable detail the facts shown on Exhibit No. 11, in accordance with the facts found by the court in reference to said Exhibit No. 11 in its findings of fact. In substance Exhibit No. 11 is the same as Exhibit No. 1, attached to the Findings of Fact and Conclusions of Law herein. To the introduction of this exhibit the defendant made the following objections:

"There are two columns on these sheets to which we desire to specifically and especially object. One is entitled 'Amount Due at Date of Deed,' and the other is entitled 'Taxes Paid', and then there is the Summary, which is the last sheet of the exhibit, which undertakes to give the totals on the various sheets under the heading 'Amount Due at Date of Deed' and 'Taxes Paid.' This is a suit to quiet title, and it is wholly immaterial what taxes they paid, and what amount they paid for the property. We therefore object to the exhibit as being irrelevant and immaterial, unless these columns are sticken out, and also the Summary is stricken out. These have no application whatever to any issue in this case."

(Testimony of R. P. Parry.)

The objection was overruled by the court and an exception allowed defendant to the court's ruling.

The exhibit contained all the data shown on Exhibit No. 1, attached to the Findings of Fact. The land described in said exhibit had appurtenant thereto a total of 11,114.36 shares of water stock, and was acquired by plaintiff company and its predecessors by six different methods. Lands to which 4,781.15 shares of water stock were appurtenant were acquired by the Trustee through the foreclosure of water contracts.

Mr. Parry, continuing his testimony, said:

"Plaintiff's Exhibit No. 12 is a specimen sheriff's deed on foreclosure, by which title was acquired by the Trustee."

Exhibit No. 11 contains a list of lands included in the instant action, to which are appurtenant water stock aggregating 1,129.58 shares, which were acquired by the Investment Company by [149] reason of assignments of sheriff's certificates of sale arising out of cases instituted by the Trustee for the foreclosure of water contracts. The assignments were executed and delivered by the Trustee to the Investment Company after the certificate of sale had issued in each of those foreclosure actions, and the sheriff's deed to the premises afterwards issued to the Investment Company by reason of such assignment.

Mr. Parry testified as follows as to such lands:

(Testimony of R. P. Parry.)

"Plaintiff's Exhibit No. 13 is another typical sheriff's deed, in which the sheriff conveyed the premises described therein to the Investment Company, and the instrument is typical of the class of cases in which foreclosure was started and conducted in the name of the Trustee up until the land was bought in and the sheriff's certificate of sale issued, and then that certificate was assigned to the Investment Company and the deed was issued to the Investment Company."

Exhibit No. 11 discloses that certain lands, to which are appurtenant 394.97 shares of the water stock involved in the action at bar, were acquired by the Land and Water Company by reason of the foreclosure of mortgages taken in lieu of outstanding water contracts upon which payments had become delinquent, representing the same debt; that is, in some cases where payments became due on the water contracts and were delinquent, the Land and Water Company refinanced the amount of the water contract, combining the unpaid principal and interest thereof in a mortgage which the settler executed. The lands in this class were acquired by the Land and Water Company upon the foreclosure of such mortgages. The "amount due at date of deed," as shown on Exhibit No. 11, is the amount due on said date on the water contract under which the water right was sold. [150]

Mr. Parry testified as follows as to this class:

"Plaintiff's Exhibit No. 14 is a typical sheriff's

(Testimony of R. P. Parry.)

deed to the Land and Water Company, covering land acquired by foreclosure of such mortgages, conducted in the name of the Land and Water Company."

Exhibit No. 11 also contains 40 acres, the original contract of which was assigned by the Land and Water Company to the Investment Company and foreclosure of such contract was had in the name of the Investment Company, and the sheriff's deed (Exhibit No. 15) to the premises ran directly to it.

Exhibit No. 11 also contains a list of the lands involved in the case at bar, to which are appurtenant water stock aggregating 335.68 shares, acquired by the Land and Water Company in lieu of foreclosure of the water contracts.

Mr. Parry testified as follows as to that:

"Plaintiff's Exhibit No. 16 is a typical quitclaim deed, and it represents the class of deeds by which lands and water rights were deeded back to the Land and Water Company in lieu of a foreclosure of the water contract which was delinquent and unpaid. It was the policy of the Bondholders' Committee, where a contract was delinquent, and it appeared that it could not be paid out, to save the expense of foreclosure, to give the person owning the land the opportunity to convey it in lieu of foreclosure. That was sometimes done before foreclosure action was started, and sometimes it was after the action was started, and the action was then dismissed."

(Testimony of R. P. Parry.)

Exhibit No. 11 also contains a list of lands involved in the case at bar, to which are appurtenant water stock aggregating 3,643.42 shares, which were acquired by the Investment Company by deed from the entrymen in lieu of foreclosure of the water contracts. [151]

Mr. Parry testified as follows as to that:

"Plaintiff's Exhibit 17 is a quitclaim deed which is typical of the class of conveyances of land in which titles were taken back by the Investment Company. These quitclaim deeds were obtained under the same circumstances that the quitclaim deed which is shown and typified by Exhibit No. 16 was obtained. The function of the Investment Company during the time that I have been familiar with it, up to December 1936, when the merger occurred, was that the Investment Company was a wholly owned Idaho corporation, its stock owned by the bondholders and the corporate agency used for convenience in holding title and reselling the land and water rights. On December 11, 1936, it was merged into the plaintiff and the company disappeared."

Mr. Parry further testified:

"Exhibit No. 18 is an agreement of merger under which the Investment Company was merged in the Land and Water Company and the name changed to the Idaho Farms Company. The date of the merger is December 11, 1936. Everything that the Trustee had was conveyed to the Land and Water Company by final document, being recorded just

(Testimony of R. P. Parry.)

prior to the completion of the merger. A general deed was taken, which deed covered all of the land shown on Exhibit No. 11 which the Truste had title to or interest in. In some cases there had been prior deeds to the Water Company, but the final blanket deed was taken. The trust deed was released. In that reorganization all the capital stock of the Land and Water Company which could be located was cancelled, and new stock was [152] issued with a par value of $45.00 per share. That was issued to each bondholder, each bondholder being given one share of $45.00 par value in stock for each $100.00 par value of the bonds, and the bonds cancelled and destroyed; so from that time on the stockholders of plaintiff company were persons who had previously been bondholders. There are 37,601 shares of the par value of $45.00 each outstanding.

"The merger agreement was filed in the office of the Secretary of State of Delaware and in the office of the Recorder of Deeds of the county in Delaware in which the original certificate of incorporation of the Land and Water Company was filed; and then it was filed in the office of the Secretary of State of Idaho on December 11, 1936, and on the same date certified copies were recorded in Jerome County, Idaho, which was the principal place of business of the corporation in Idaho, and in other counties in which it owned property.

"Since December, 1936, the plaintiff has been a Delaware corporation. It is qualified to do business in Idaho."

(Testimony of R. P. Parry.)

Exhibit No. 18 was introduced in evidence, which contains, among other things, the following statements and agreements: [153]

PLAINTIFF'S EXHIBIT 18

"Article I. The Investment Company shall be and hereby is merged with and into the Land and Water Company, and the separate existence of the Investment Company shall and hereby does cease, and said two corporations are hereby merged into a single corporation which shall be, and is, the Land and Water Company, and which is hereinafter referred to as 'Surviving Corporation.'

"The name of the Surviving Corporation shall be and is 'Idaho Farms Company.'

"Article II. The laws which shall govern the Surviving Corporation shall be the laws of the State of Delaware.

"Article III. The Certificate of Incorporation of Land and Water Company, as amended, shall continue to be the Certificate of Incorporation of said Idaho Farms Company, the Surviving Corporation, and is hereby changed as follows: * * *

* * * * * * *

"Article IX. The Surviving Corporation shall possess all the rights, privileges, powers and franchises as well of a public as of a private nature and be subject to all the restrictions, dis-

(Testimony of R. P. Parry.)

abilities and duties of each of said corporations so merged, and all and singular the rights, privileges, powers and franchises of each of said corporation, and all property, real, personal and mixed, and all debts due to either of said constituent corporations on whatever account as well for stock subscriptions as all other things in action or belonging to each of said corporations shall be vested in the corporation surviving such merger; and all and every other interest shall be hereafter as effectually the property of the Surviving Corporation as they were of the several and respective constituent corporations; and the title to any real estate, whether by deed or otherwise, vested in either of said constituent corporations shall not revert or be in any way impaired by reason of said merger; provided that all rights of creditors and all liens upon the property of either of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall henceforth attach to said Surviving Corporation and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

* * * * * * *

[154]

"Article XIII. The Surviving Corporation hereby agrees that it shall be responsible for

(Testimony of R. P. Parry.)

all the liabilities and obligations of each of the constituent corporations, and that their liabilities and those of their shareholders, directors and officers shall not be affected, nor the rights of creditors in any way impaired, and that any claim existing or action or proceeding pending may continue, and that the courts of the State of Idaho shall retain such jurisdiction as by statute provided, all as provided in Chapter 1 of Title 29, Idaho Code Annotated."

Whereupon, Plaintiff's Exhibits Nos. 12 to 18 inclusive were offered in evidence and admitted.

Mr. Parry continues:

"In the instances where lands were acquired by quitclaim deed in lieu of foreclosure, the water contract was seldom released of record. Some such contracts may have been released, but those are exceptional cases, and substantially all such water contracts are still unreleased."

(Cross-Examination)

"No atttempt has been made to collect the unpaid balances on these water contracts, and the settler was not expected to pay further upon them. In foreclosing the water contracts these contracts were put in evidence in the case, and the usual form of decree of foreclosure was obtained, after which order of sale issued and the usual sale was held. Judgment was taken in the aggregate amount of the un-

(Testimony of R. P. Parry.)

paid principal with interest to the date of judgment and court costs. Taxes were not included in the judgment, and no taxes had ever been paid prior to the acquisition of the lands by foreclosure. The land in question has not been farmed since its acquisition.

"The item 'Amount Due at the Time of Deed' includes sheriff's costs and cost of publishing notice of sale, in addition [155] to principal, interest and court costs. Maintenance charges were not included in these foreclosure actions. The column represents the amount that the foreclosing plaintiff paid for the property at foreclosure sale.

"The water stock certificate appurtenant to lands under foreclosure had been issued in the name of the settler and by him endorsed in blank and held in the possession of the Construction Company at all times. Very little of this stock has been transferred on the books of the Canal Company and a new certificate issued therefor.

"The Investment Company was a sort of agent of the Bondholders' Committee and the Land and Water Company. It was a sort of holding company for all the various real estate items that the Bondholders' Committee owned; it was an agency for convenience that took title to all of the real estate and resold it.

"The Investment Company was incorporated about the year 1907. It owned farms and also town lots in Jerome, Wendell and Hollister, Idaho. I

(Testimony of R. P. Parry.)

don't know of its having any other farms than those taken back on the foreclosure of contracts and mortgages.

The Bondholders' Committee owned all of the stock of the Investment Company save that of the qualifying stockholders. The stock was part of the Kuhn assets, which were turned over to the Bondholders' Committee in lieu of foreclosure of the trust deed. Prior to the time the stock of the Investment Company was turned over to the Bondholders' Committee, I think it was owned by the Land and Water Company, but the records back there are rather vague. [156] I do not know who owned the stock of the Land and Water Company prior to the time of the creation of the Bondholders' Committee, which finally acquired all save 213 shares which could not be found. Initially in 1913 the Bondholders' Committee got a majority of the stock of the Land and Water Company, but later on it acquired all the stock which it was possible to find. In 1913 when the Land and Water Company became insolvent, in lieu of foreclosure there was transferred all of the assets at that time. The assets of the company were turned over to the bondholders by delivery of the assets of the company to the Committee. All of the known bondholders deposited their bonds under the bondholders' agreement, with the exception of about $4,250.00 which were never located. At the time of the default there were $3,770,000.00 of bonds outstanding. As I know the facts,

(Testimony of R. P. Parry.)

from 1919 all of the property of the Investment Company was subject to the bondholders. When finally the stock of the plaintiff company was issued to the bondholders at the time of the merger the bonds were burned up. Prior to the time of receiving the stock the bondholders had received cash payments equivalent to 55% of the principal of the bonds. The stock represented just 45%, the unpaid balance of the principal of a $100.00 bond.

"Mr. R. E. Shepherd was manager of the Bondholders' Committee on the project for a long period of time. I directed the foreclosure of some of the water contracts. Some of the employees of the Bondholders' Committee were, from time to time, directors of the Canal Company.

"Sometimes in the past the Bondholders' Committee voted the water stock appurtenant to these lands at Canal Company's stockholders' meetings. Under the state contract, the Land and Water Company was given the right to vote the stock until 35% of [157] the principal was paid. Sometimes in the past they had voted the stock, but for several years prior to 1919 they had not been voting it. Since 1920 the defendant has operated and managed the irrigation system. I was attorney for the Canal Company from about 1930 to December 31, 1936."

(Redirect Examination)

"The irrigation system was conveyed to the defendant Canal Company in the year 1920. The land

(Testimony of R. P. Parry.)

listed in Exhibit No. 11 is in sagebrush; it is rough, sandy and rocky; and irrigation water has not been delivered thereto for many years. This land is owned by Idaho Farms Company, plaintiff herein."

(Recross Examination)

"When the Bondholders' Committee came in charge of the project, it collected the income from the water contracts, the sale of the water stock, and the land. It was compelled to advance some $2,000,000.00 to complete the system after it took over, and out of the proceeds there was paid back what was borrowed to finish the system, the operating expense, and the balance went to the bondholders. The expense of the Bondholders' Committee was determined and allotted to it by a decree of the Federal Court in Chicago in 1928. The accounts were approved and the fees fixed. Defendant's Exhibit No. 19 is a copy of that decree."

Whereupon, defendant's Exhibit No. 19 was offered in evidence and admitted.

DEFENDANT'S EXHIBIT 19

provides in part as follows:

"The Court doth find: * * *

"As a direct result of the committee's activities the committee has been able to repay to bondholders a total of $1,882,400.00 or 50% of the principal of the outstanding bonds and is about to make an additional payment of 5%

(Testimony of R. P. Parry.)

and the company now has assets [158] of an estimated value of $3,493,128.54, which the Committee believes will be sufficient to ultimately pay bondholders the full face value of their bonds and possibly accumulated interest thereon.

* * * * * * *

"It is therefore ordered, adjudged and decreed:

* * * * * * *

"2. That the administration and the reports and accounts of said Bondholders' Protective Committee of Twin Falls North Side Land and Water Company, including the allowance to the members of said committee, as balance of their compensation for services up to February 28, 1927, of the proceeds of $158,450 face value of contracts receivable of Twin Falls North Side Land and Water Company as of February 28, 1927, if and as said contracts receivable are collected and paid over to said committee, on account of their said compensation less the expense of collecting the same, should be, and the same hereby are, in all respects approved and confirmed."

Plaintiff rests.

(Direct Examination)

"The Court: I understand there are actions pending in the State Court involving the 1936 and 1937 levy which you claim was made?

"Mr. Snow: That is right.

"Mr. Stephan: Action for the foreclosure of the maintenance levy for 1935, 1936 and 1937. After this action was commenced in this Court I might say that so far as the other actions were concerned for the foreclosure of the maintenance liens for 1932, 1933 and 1934, we procured from the District Court in Jerome County an order enjoining the plaintiff from here prosecuting this action, [159] in so far as it would affect the 1932, 1933 and 1934 liens. Following an order made,—an order of injunction made by Judge T. Bailey Lee, following that, a disclaimer was filed by counsel for the plaintiff here disclaiming any intention of litigating in this suit the controversy involved in that lien for foreclosure of 1932, 1933 and 1934. I refer to the other suit which was started in 1937 for the foreclosure of the 1935 and 1936 liens.

"The Court: Then so far as we are concerned, the levies are for 1935, 1936 and 1937?

"Mr. Stephan: That is correct.

WAYNE BARCLAY,

a witness for defendant, testified as follows:

(Direct Examination):

"I reside at Jerome. I am a lawyer by profession, and have been acting as attorney for the defendant company since about 1930. Prior to that time, until about October, 1929, the late Judge Barclay was counsel for the Canal Company, and I have been attorney for that company since that time. I think Walters, Parry & Thoman had a contract, and I was employed by Mr. Parry to asist. That firm represented the Canal Company from about January of 1930, when District Judge Barclay handed in his resignation, until the latter part of 1936.

"I have some exhibits that were prepared under my supervision. Exhibit No. 21 is a certified copy of the annual statement [160] filed by the North Side Canal Company in Jerome County for the year 1935. Exhibit 22 is a certified copy of the maintenance lien for the year 1935 filed in Jerome County. The difference between the exhibits is this: It is necessary for us in March of each year to file a statement with the County Recorder certifying the maintenance that will be charged for the year, and the annual statement for 1935 declares that the maintenance payable April 1, 1935 is $1.00 per acre. That is the annual statement."

Exhibits 21 and 22 contain the facts, information and data as set out in Finding XIII of the court herein.

(Testimony of Wayne Barclay.)

Mr. Barclay continues:

"Exhibit 23 is a certified copy of the annual statement filed in Jerome County for 1936. Exhibit 24 is a certified copy of the maintenance lien filed in Jerome County for 1936."

The exhibits referred to contain the information, facts and data as set out in Finding XIV of the court herein.

Mr. Barclay continues:

"Exhibit 25 is a certified copy of the annual statement filed in Jerome County for the year 1937. Exhibit 26 is a certified copy of the maintenance lien for the year 1937 filed in Jerome County."

Exhibits 25 and 26 contain the facts, information and data as set out in Finding XV of the court herein.

Exhibits 27 and 28 are similar to 21 and 22 and cover the maintenance charges for the lands in Gooding County for the year 1935.

Exhibits 29 and 30 are similar to Exhibits 23 and 24, but cover the maintenance charges for the year 1936 on the lands in Gooding County. [161]

Exhibits 31 and 32 are similar to Exhibits 25 and 26, and cover the maintenance charges for the year 1937 on the lands in Gooding County.

Mr. Barclay, continuing, said:

"Defendant's Exhibit No. 33 is a certified copy of the records and files of an action in the District Court of the Eleventh Judicial District of the State of Idaho in and for the County of Jerome, wherein

(Testimony of Wayne Barclay.)

the North Side Canal Company, Limited, a corporation, is plaintiff, and the Idaho Farms Company, a corporation, Successor to the Twin Falls North Side Investment Company, Limited, a corporation, is the defendant. The case Number is 2294. The action seeks to foreclose the Canal Company's maintenance lien for the years 1935 and 1936 on certain lands in Jerome County. The action was commenced on December 24, 1937, and seeks to foreclose the lien described in Defendant's Exhibits 22 and 24.

"Exhibit No. 34 is a certified copy of the records and files in an action filed in the Eleventh Judicial District of the State of Idaho in and for the County of Jerome, wherein the North Side Canal Company, Limited, a corporation, is the plaintiff, and the Continental and Commercial Trust and Savings Bank, a corporation, and the Idaho Farms Company, a corporation, and the Continental National Bank and Trust Company of Chicago, a corporation, are defendants. This is Case No. 2295. The action was commenced and the lis pendens filed on December 24, 1937. This seeks to foreclose the maintenance lien described in Defendant's Exhibits Nos. 22 and 24, for 1935 and 1936, on certain other lands in Jerome County.

"In addition to the actions in Jerome County, there is pending in the District Court of the Fourth Judicial District of the State of Idaho, in and for Gooding County, Action No. 3260 entitled, [162]

(Testimony of Wayne Barclay.)

"The North Side Canal Company, Limited, a corporation, vs. the Idaho Farms Company, Successor to the Twin Falls North Side Investment Company." This seeks to foreclose the maintenance lien on certain lands for the years 1935 and 1936 covered by Defendant's Exhibits 28 and 30. There are two causes of action in each complaint: One for the lien for 1935, and one for the lien for 1936. This action was commenced December 24, 1937.

"There is also pending in the District Court of the Fourth Judicial District of the State of Idaho for Gooding County Case No. 3261, in which the North Side Canal Company, Limited, a corporation, is plaintiff and the Continental and Commercial Trust and Savings Bank, a corporation, and the Idaho Farms Company, a corporation, and the Continental National Bank and Trust Company of Chicago, a corporation, are defendants. This action was commenced on December 24, 1937; and it seeks to foreclose the maintenance lien of the Canal Company for the years 1935 and 1936, covered by Defendant's Exhibits 28 and 30, on certain other lands.

"No actions have been commenced for the foreclosure of the 1937 liens.

"There are pending in Jerome County and Gooding County actions attempting to foreclose the maintenance liens for the years 1932, 1933, 1934, 1935 and 1936, but only the liens for 1935, 1936 and 1937 are involved in this controversy."

(Testimony of Wayne Barclay.)

Whereupon counsel for defendant offered in evidence Exhibits Nos. 21 to 34 inclusive, to which counsel for plaintiff objected as follows:

"We have no objection to exhibits numbered 21 to 32, inclusive, being admitted in evidence, but we do object to the introduction in evidence of Exhibit No. 33 and Exhibit No. 34 for these reasons: [163]

"It is conceded that the plaintiff is the owner of the liens described in this foreclosure suit. This suit we are involved in here was begun on the 24th day of November, 1936,—no; that should be November, 1937,—and a month later, after the beginning of this suit, and after the record and files disclosed that appearance was made a suit was begun in another Court to foreclose these liens, and it is our theory that after this Court obtained jurisdiction of the subject matter of these liens no other Court was a proper Court in which to begin any action for the foreclosing of the liens. The statute under which the foreclosure suit was begun provides as follows: 'No lien provided for in this chapter binds any land for a longer period than two years after the filing of the statement mentioned in Section 41-1903, unless proceedings be commenced in a proper Court within that time to enforce such lien.' It provides that unless the action is begun to foreclose the lien within two years from the date of the filing of the lien,

(Testimony of Wayne Barclay.)

but in the statute it is called a statement, then the lien ceases, unless the foreclosure is begun in the proper Court, and we think that the record discloses on its face that the suit was not begun in the proper Court, and we object to Exhibits No. 33 and No. 34, and in connection with this objection I move to strike from the record the testimony of a similar suit in Gooding County. I was under the impression that the testimony was simply to identify the exhibits that he had before him, which I thought might be exhibits numbered 35 and 36, and as far as preserving any right of the defendant under the claim of lien, we think that any evidence in regard to the beginning of this suit is of no avail, and we object to the introduction of this, and move to strike the testimony regarding the suit number 3260 and 3261."

Whereupon the Court sustained the objection of counsel for the plaintiff, and its motion to strike, to which rulings counsel for the defendant duly excepted and the exception was allowed by the Court.

(No Cross Examination)

DELBERT H. HENDERSON,

a witness for defendant, testified as follows:

(Direct Examination)

"My name is Delbert H. Henderson, and I live at Bliss, Idaho. My occupation is assistant water master for North Side [164] Canal Company, Limited. I have lived at Bliss and followed such occupation since December, 1919. Prior to that time I was employed by the Canal Company as a ditch rider, commencing with the year 1916.

Since my employment with the Canal Company I have become familiar with the system generally; and the ditches in the system are not of sufficient capacity. Prior to 1936 the "X" lateral did not have an upper bank in many places, causing water flowing therein to flow out of the canal and into ponded areas. This resulted in loss of irrigation water and the impairment of the delivery of water to the users. Since the year 1931 and from year to year thereafter—particularly the years 1936 and 1937—a bank has been constructed on the upper side of this lateral, which has resulted in a more efficient delivery of water through it, a saving of water and a confinement of the water in the lateral in a well-defined channel. The removal of rock and earth from this lateral assisted in this improvement. Until the construction of the Gooding ditch the main canal capacity was not sufficient to serve the project. The laterals known as X-4, Y and Z have also been improved in the same manner."

(Testimony of Delbert H. Henderson.)

(Cross Examination)

"The 'X' lateral within my district is approximately four miles long and about 32 feet wide from water edge to water edge, and the water depth is approximately three feet. In 1928 the tules were cleaned from this portion of the lateral, and no other work was done on that portion until 1931. Through a series of years this lateral will develop berms and tule patches; but it is not necessary to clean the lateral every year.

"During the year 1937 the lower bank of both the 'X' and the X-4 was raised approximately two feet for a distance of about two feet on the bank of each lateral. Neither laterals 'X' nor X-4 [165] have ever had a full and complete bank on each side. The dirt from which these banks were constructed came from borrow pits, and was not taken from the bottom of the lateral. It was not possible to obtain sufficient dirt from the bottom of the ditch to construct the necessary banks. There were sink holes in the bottoms of the ponded areas, resulting in a continuous loss of water into the earth."

FLOYD EAKEN,

called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

"My name is Floyd Eaken. I live one mile west of Wendell, Idaho, and I am engaged in the busi-

(Testimony of Floyd Eaken.)

ness of farming and stockraising. I have been farming on the North Side Project for 18 years last past, and am the owner of 325 acres of irrigated land in the Third Segregation of the project. I receive irrigation water for all this land from the 'X' lateral. A considerable amount of work was done on the 'X' lateral during the years 1936 and 1937 in building banks and constructing a channel, and since this work has been done I have had more regular delivery of irrigation water and have received more water for my farms than before such work was done.

"I am familiar with the lateral between Big Wood River and Bliss known as the 'Y' lateral. During the years 1935 and 1936 I saw the teams and fresnoes at work on this lateral and saw the banks being built, to cut off the ponded areas. There were two such banks being built at least 250 feet in length."

(Cross Examination)

"The dirt used to construct these banks was obtained from borrow pits along the canal right-of-way. It was not obtained from the channel of the canal. The first bank constructed on this lateral cut off a slough of about an acre and a half in extent. There were two other ponds or sloughs of about the same size cut off in the same manner." [166]

JOHN BEHRNES,

who was called as a witness on behalf of the defendant, after being duly sworn, testified as follows:

"My name is John Behrnes, and I live two and a half miles southeast of Bliss, Idaho. I am and have been engaged in farming at that place since 1912. My farm is within the Third Segregation of the North Side project.

"I am familiar with the course and location of the 'X' lateral, which serves my farm. Prior to 1936 there was no channel in this lateral permitting the water to flow out over ponded areas. I know that considerable improvement work was done in stopping such flow and constructing a channel during these years. Since the completion of the improvement I have been receiving more irrigation water, which is delivered more efficiently than it was prior to the improvement."

FRANCIS L. DORMAN,

called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

"My name is Francis L. Dorman, and I live at Wendell, Idaho. I have lived at Wendell since January of 1909, and have owned and operated farms on the North Side project since that time. I am County Commissioner of Gooding County, Idaho.

"Between the years 1909 and the present time I have owned, from time to time, 800 acres of land.

(Testimony of Francis L. Dorman.)
I am familiar with the location of the lands involved in this litigation. They have received no irrigation water since about 1910."

(No Cross Examination)

HARVEY W. HURLEBAUS

was called as a witness on behalf of the defendant, and after having been duly sworn, testified as follows: [167]

"My name is Harvey W. Hurlebaus. I live at Jerome, Idaho, and have resided there since 1907. I am Secretary-Treasurer of North Side Canal Company, Limited, and have held that office since the company was formed in 1912. The offices and principal place of business of this defendant are at Jerome, Idaho.

"I was Secretary of the Investment Company from the time of its creation until 1914. The Investment Company maintained offices in Jerome, and its principal place of business was Pittsburgh, until about 1914, and at that time changed to Minneapolis. The office of the Land and Water Company and the office of the Investment Company in Jerome were in the same room in the same building.

"Defendant's Exhibit No. 36 is a certified copy of the Articles of Incorporation of North Side Canal Company, Limited, together with the amendments thereto."

(Testimony of Harvey W. Hurlebaus.)

Whereupon, defendant's Exhibit 36 was admitted in evidence.

Mr. Hurlebaus continues:

"I became acquainted with Mr. R. E. Shepherd at the time he came to the North Side project in 1913. He represented the Bondholders' Committee from that year until the time of the merger in December, 1936. During his residence on the North Side project he was General Manager of the Land and Water Company until the time of the merger. Mr. Shepherd was also during this time the General Manager of the Investment Company. In addition to these offices, Mr. Shepherd became President of the North Side Canal Company, Limited, in November of 1917, and served as President until May 1, 1920. On September 20, 1921 he was appointed General Manager of defendant, and continued as such manager until April 7, 1937. As President and as General Manager of the Canal Company he attended [168] regular meetings of the Board of Directors and the regular annual meetings of the stockholders of the company, as well as any special meetings which were called from time to time. As General Manager of the Canal Company Mr. Shepherd made recommendations to the Directors and to the stockholders concerning the improvement of the system.

"Among the improvements of the canal system and project urged and recommended by Mr. Shepherd was the construction, in the years 1927 and

(Testimony of Harvey W. Hurlebaus.)

1928, of what is known as the Gooding Canal together with A Siphon and B Siphon, at a cost of $353,724.99 and interest. Mr. Shepherd recommended to the Board of Directors that the Canal Company lease from the Government 150,000 acre feet of storage space in the American Falls Reservoir at a cost of 12½ cents per acre foot—the water acquired thereby having been and being used on the entire project as a further and more complete water right. The lease runs for ten years, and will expire in 1940. Mr. Shepherd has continuously urged during his association with the company the acquisition of permanent space in the American Falls Reservoir to provide further water rights for the project.

"On Mr. Shepherd's recommendation the defendant company in the year 1935 purchased from American Falls Reservoir District 20,000 acre feet of storage space in American Falls Reservoir, at a total cost of $127,737.77, together with interest—$83,847.77 of which remains unpaid. This purchase was made for the benefit of all of the three segregations of the project, and the water supplied thereby has been made available for use on the three segregations.

"Mr. Shepherd recommended a change in the type and construction of the headgates used on the project, the change being from a wooden headgate to a more costly and larger steel headgate. [169]

(Testimony of Harvey W. Hurlebaus.)

"The budget was always prepared by the water master and myself and submitted to Mr. Shepherd for his recommendation. After examination it was submitted to the Directors for approval. Mr. Shepherd did not at any time protest the amount of the assessments levied for maintenance. The maintenance levy for the year 1935 was $1.00 per acre; in 1936, $1.25 per acre; and in 1937, $1.50 per acre. Mr. Shepherd approved these assessments as being the necessary levy considering the amount of work necessary to be done by the company in those years. The maintenance assessment levied against the lands of plaintiff involved in this action have not been paid for the years 1935, 1936 and 1937, and are delinquent. The assessments for maintenance are made on a stock basis, that is: the amount of the maintenance levy is assessed against each share of stock outstanding in the defendant company.

"The Investment Company owned the townsites of Jerome, Milner, Oakley and Hollister. It built and operated hotels in Milner, Jerome and Wendell. It operated banks at Jerome and Milner.

"In the early days of the project, on the foreclosure of water contracts the Investment Company took title to the premises instead of the Land and Water Company, for the reason that it was thought that any liability incurred by the Land and Water Company would not follow to the Investment Company. In later years it became a general holding company for the Land and Water Company.

(Testimony of Harvey W. Hurlebaus.)

"I have Defendant's Exhibit No. 37, the same being the abstract of title to the NW¼ SE¼ and the NE¼ SW¼ of Sec. 14. Twp. 8 South, Range 15 East, Boise Meridian, Gooding County, Idaho, certified on the 5th day of March, 1938. The real estate described is in the Second Segregation of the project." [170]

Whereupon defendant offered in evidence Defendant's Exhibit 37. Counsel for plaintiff objected to the admission of the exhibit as follows:

> "With respect to the exhibit which was offered before the recess, we have no objection to the introduction, with the exception that Entry No. 53 shows the lis pendens to that suit which was brought in the District Court of the State of Idaho and for Gooding County subsequent to the filing of this action, and which perhaps raises the same question upon which the court has reserved its ruling. If our theory is correct, we are entitled to exclude the evidence of any lien based upon any other foreclosure proceeding than in this court. We object to that entry upon the ground that it tends to show the proceedings to perfect this lien are improper and invalid."

Whereupon Exhibit No. 37 was admitted in evidence save and except as to the Entry 53 of the filing of lis pendens and complaints in the foreclosure action referred to in Exhibits 33 and 34, to which

(Testimony of Harvey W. Hurlebaus.)
ruling counsel for defendant duly excepted and the exception was allowed by the court.

DEFENDANT'S EXHIBIT 37

is in part as follows:

"Entry 21.

"In the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Gooding.

Case No. 253—Dated.....

"THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, Trustee,

Plaintiff,

vs.

HENRY STRICKLAND, MRS. HENRY STRICKLAND, wife of said HENRY STRICKLAND, JAMES E. WADE and MRS. JAMES E. WADE, wife of said JAMES E. WADE,

Defendants.

COMPLAINT

"Plaintiff alleges:

(Corporate existence of plaintiff and Land and Water Company alleged) [171]

(Reference to Carey Act and state statutes and state contract dated August 21, 1907, set out.)

(Testimony of Harvey W. Hurlebaus.)

"That by the terms of said State Contract, said Company was authorized to sell water rights or shares of said irrigation system to each person who should make entry of land to be irrigated; said rights to be evidenced by shares of stock in the North Side Canal Company, Limited, a corporation.

"That pursuant to the provisions of said State Contract, the Company, on December 4, 1907, entered into an agreement with Henry S. Strickland, whereby the purchaser agreed to purchase a water right of 80 shares of stock of the North Side Canal Company, Limited, to be used upon the following land in Gooding County, Idaho:

"NW¼ SE¼, and NE¼ SW¼, Sec. 14, T. 8 S. R. 15 E. B. M.

(Filing and recording of settler's contract set out.)

"That the defendant herein is now the owner and holder of said land and water rights and has agreed to perform all the conditions of said contract and to make all payments therein specified.

(Execution of trust deed and assignment of water contract to Trustee set out.)

(Change of name of Trustee and power and authority of Trustee to enforce payment of water contract, alleged.)

(Testimony of Harvey W. Hurlebaus.)

"That prior to beginning of this action, there became due and owing from said defendant under said agreement, the sum of $960.00 principal and $1211.74 interest, no part of which amount has been paid; that by the terms of said agreement, it is provided that upon default in payment of any of the payments therein specified or any charge due thereunder, the Company may declare the entire amount of the principal purchase price due and may enforce the lien of said agreement;

"That prior to the beginning of this action, default has been made in the payment of the amounts due upon principal and interest and plaintiff hereby elects to declare the whole amount to be due and payable; and that by reason thereof there is now due and owing from the defendant the sum of $2560.00 principal and $1211.74 interest; no part of which has been paid.

"Plaintiff avers that there is due for maintenance charges, the sum of $60.00 and $9.60 interest thereon. [172]

"That defendants claim some right, title or interest in and to said premises and shares of stock, but that said right, if any, is subsequent and inferior to the lien and rights of the plaintiff herein.

"Wherefore plaintiff prays that it have judgment and decree of this court, declaring it to

(Testimony of Harvey W. Hurlebaus.)

have a first and prior lien or mortgage upon the premises and said shares of stock in the North Side Canal Company, Limited, and that the usual decree be made for the foreclosure of said lien and for the sale of said lands and shares of stock for the payment of the amount due to plaintiff; the sum of $3771.74 with interest thereon at 7% per annum from February 25, 1915, being the amount due on principal payments of purchase price of said water rights including interest to February 25, 1915, and for the further sum of $69.60 with interest thereon from February 25, 1915.

(That defendants be required to set up their interest in the premises, and that the premises may be sold as provided by law, et cetera, alleged.)

"Paul S. Haddock, and Longley & Walters, Attorneys for Plaintiff.

(Statement to effect that complaint verified by Paul S. Haddock, attorney for plaintiff.)

"(Exhibits attached: State Contract and Purchaser's Agreement)."

"[Endorsed]: Filed Feb. 27, 1915. 4 P. M."

Entry No. 22 of Exhibit 37 sets out the Judgment and Decree in the above cause; date of Decree, January 8, 1916. Recorded in Book 1 of Judgments, Page 246. The Judgment, among other things, states:

(Testimony of Harvey W. Hurlebaus.)

"This cause came on regularly to be heard before the Court on October 13, 1915, same being a day of the regular term of court, and Paul S. Haddock and James W. Porter appeared as attorney for the plaintiff, and the defendants nor neither of them appeared either in person or by attorney. The court having heard all the evidence and duly considered the same and being fully advised in the premises, and it appearing to the satisfaction of the court: [173]

(Recites service of summons on defendants, and that their default was entered for failure to appear.)

"That the plaintiff, after legal demand, elected to and did declare the full amount named in the water contract sued upon, due and payable and that there is now due and owing to plaintiff from defendants the sum of $4042.92 with interest thereon at 7% per annum from October 13, 1915 and for costs of this action and that said amount is a valid lien upon the lands, water rights and shares of stock described in complaint.

"That all of the terms of said contract have been broken by defendants and that plaintiff is entitled to have said contract foreclosed and the lands, water rights and shares of stock therein described, sold, and the proceeds of said sale applied to the payment of said sum of money so due as aforesaid.

(Testimony of Harvey W. Hurlebaus.)

"It is therefore ordered, adjudged and decreed that the plaintiff do have and recover from the defendants the sum of $4042.92 with interest, thereon at 7% per annum from October 13, 1915 and for costs herein, and that said amount is hereby decreed to be a first and prior lien upon the lands, water rights and shares of stock described in complaint and hereinafter described.

(Provides that the premises described, to-wit: NW¼ SE¼, NE¼ SW¼ Sec. 14, Twp. 8 S. R. 15 E. B. M., and water rights described in contract No. 1102 conveyed by Land and Water Company to Henry S. Strickland on December 4, 1907, shall be sold at public sale in the manner prescribed by Sec. 1629 of the Revised Codes of Idaho; that after time for redemption is expired the Sheriff shall execute a deed to the purchaser; states that costs have been taxed in the sum of $49.80.)

(The above entry further contains an Order of Sale issued by the Clerk of the Court and addressed to the Sheriff of Gooding County directing the sale of the above described premises pursuant to the above decree. Order of Sale issued Feb. 7, 1916.)"

Entry No. 25 of Exhibit 37 contains Certificate of Sale dated April 11, 1916, certifying that Sam Sanders, the Sheriff of Gooding County, Idaho, sold to Continental and Commercial Trust and Savings

(Testimony of Harvey W. Hurlebaus.)

Bank, Trustee, pursuant to the above decree and Order of Sale, [174] the said premises after notice given as required by law. The Sheriff certifies that:

> "* * * he duly levied on, and on March 18, 1916 at 2 P. M. at the Court House door in Gooding, said Gooding County, he duly sold at public auction, in one parcel, after due and legal notice, to second party herein, who made the highest bid therefor, for $4283.89, which was the whole sum paid by said second party, for the real estate described in said decree, and as follows:
>
> (Here follows description of the premises described above.)
>
> "Subject to redemption within 9 months by original owner and within 3 months thereafter by any person desiring to settle upon and use said land and water rights, pursuant to Section 1629 of Revised Codes of the State of Idaho.
>
> "SAM SANDERS,
> Sheriff."

Entry No. 26 of Exhibit 37 contains the Sheriff's Return of Sale, on the Order of Sale, in which the Sheriff recites among other things that after giving proper notice, et cetera,

> "* * * he sold, at the place fixed for sale, the said premises in one parcel, at public auction, to the Continental and Commercial Trust and

(Testimony of Harvey W. Hurlebaus.)

Savings Bank, Trustee, highest bidder therefor, for $4283.89 which he acknowledges to have received, and that he delivered to said purchaser a certificate of sale and filed a duplicate thereof in the office of the County Recorder of said County.

"SAM SANDERS,
Sheriff."

Entry No. 29 in Exhibit No. 37 is a Sheriff's Deed dated March 19, 1917 from Sam Sanders, Sheriff of Gooding County, to Continental and Commercial Trust and Savings Bank, Trustee. This document recites the sale of the above described premises pursuant to the decree of foreclosure, and that, no redemption having been made, the said premises, together with the water right appurtenant thereto, were by the Sheriff conveyed to said Trustee. [175]

Mr. Hurlebaus, continuing his testimony, said:

"The total amounts claimed by defendant under its liens against the land set out and described in plaintiff's Exhibit 11 for the year 1935 is $10,092.36; in 1936 it is $12,447.44; and in 1937 it is $14,428.63. These are the principal amounts, without interest.

"After plaintiff acquired title to the various parcels of land described in Exhibit 11, it paid the defendant's maintenance assessment levied against each parcel each year to and including the year 1931.

(Testimony of Harvey W. Hurlebaus.)

"The firm of Walters & Parry was attorneys for the Land and Water Company during the year 1925, and defendant's Exhibit 38 is a letter dated October 23, 1925 addressed to Walters & Parry, Twin Falls, Idaho, written by myself as Secretary of the Canal Company. Defendant's Exhibit No. 39 is the reply to such letter by Judge Walters to myself, dated October 30, 1925."

Whereupon defendant's Exhibits Nos. 38 and 39 were offered in evidence.

To the introduction of these exhibits counsel for plaintiff made the following objection:

"Mr. Snow: We object to the introduction for the following reasons: It is apparently a letter from E. A. Walters, who was Judge Walters, and it is dated October 30th, 1925, and it expressed an opinion as to one of the points in controversy in this case. In that year, 1925, there was in force at that time an opinion and decision of this Court which was apparently adverse, and in fact, wholly adverse to the contention that plaintiff is [176] now asserting, and subsequently on appeal the decision rendered by this Court was unanimously reversed, and thereafter it was reviewed by the Supreme Court of the United States, and on May 31st, 1927, the Supreme Court unanimously upheld the Circuit Court of Appeals, and the opinion I have reference to is the opinion of this Court which was erroneous and which Judge Walters followed, which in turn was declared to be entirely erroneous.

(Testimony of Harvey W. Hurlebaus.)

"Mr. Stephan: I would like to correct Mr. Snow on that. I think this letter shows conclusively that the letter was written after the opinion was handed down from the Circuit Court of Appeals. Both the opinion of this Court and of the Circuit Court of Appeals was available to counsel and was considered by him at the time this opinion was written."

Plaintiff's objection was sustained by the Court and an exception granted defendant.

DEFENDANT'S EXHIBIT No. 38

is as follows:

"October 23, 1925.

"Walters & Parry,
Twin Falls, Idaho

"Gentlemen:

"Lot 2 in Sec. 1, Twp. 9 S., R. 15 E., B. M., originally stood under a Water Contract in the name of James Riddell and said Water Contract was later on converted into a note and mortgage, the whole amount, however, being part of the Water Contract indebtedness, a portion having been [177] cancelled by claim settlement. This forty has been deeded back to the Investment Company. It involves back maintenance totalling $199.60.

"Please advise whether, in view of the Portneuf-Marsh Decision, there is any distinction between a Water Contract of the Land & Water Company and the mortgage as covered above.

(Testimony of Harvey W. Hurlebaus.)

If there is a distinction and this case does not come under said Decision, the Investment Company will pay the maintenance involved.

"Your early reply will be appreciated.

"Very truly yours,

"NORTH SIDE CANAL COMPANY, LIMITED,

"By.....

"HWH:NC" Secretary."

DEFENDANT'S EXHIBIT No. 39

is as follows:

"Oct. 30, 1925.

"Mr. Harvey Hurlebaus,
Secretary, North Side Canal Co.,
Jerome, Idaho

"Dear Sir:

"I have yours of October 23rd, making inquiry as to whether or not the Investment Company must pay maintenance on Lot 2, Sec. 1-9-15. Whenever Carey Act land passes into private ownership, it must then pay maintenance from the time it loses its identity as Carey Act land. Whenever the Land & Water Company or Trustee has, by any means, passed title to land to the Investment Company, then from the date of such transfer, the prior lien of the Carey Act contract no longer exists, and

(Testimony of Harvey W. Hurlebaus.)

the lien of the Canal Company becomes paramount.

"In such instances, the Investment Company stands in the same position as any other private owner and maintenance must be paid by the Investment Company from the date it becomes connected with the title.

"My advice is that in the instant case, the Investment Company is liable for the payment of the maintenance.

"Very truly yours,

"E. A. WALTERS."

"EAw/C" [178]

(Cross Examination of Mr. Hurlebaus)

"During the years since the Trustee for the bondholders of the Land and Water Company obtained this land on sheriff's deeds on the debts as shown on plaintiff's Exhibit No. 11, said lands have received no water. There are a few cases where the land did receive water. The list of lands includes all of the delinquencies, and some did receive water. In all cases where water was delivered to the land the maintenance was paid for the year the land received water. When the land was sold to some settler the settler paid the maintenance. The water that was not delivered to the lands involved in this suit was delivered to the rest of the project. That has always been the case. When the water was there the other landowners had a right to it up to the ex-

(Testimony of Harvey W. Hurlebaus.)

tent of their contract. There is some water appurtenant to these lands listed in Exhibit No. 11 which is not represented by shares of stock of the defendant company. The water right on the second segregation was 1.13 acre feet per acre, increased by 50% if the reservoir was filled."

"Q. So that in addition to the water represented by this stock other lands on the project during the years the maintenance was not paid, had not only received the water appurtenant from the stock, but approximately two acre feet from the other water?

"A. Yes and no. Some years there was a carry-over and that could be a question. [179]

"Q. Generally speaking, that is correct, is it not?

"A. Well, yes. I should say that is probably correct with the exception that I know,——

"Q. —Except the years there was a surplus when it was not available?

"A. Yes, sir."

"In some years there was a carry-over in the reservoir.

"I would say that about $100,000.00 of maintenance has been paid to the Canal Company on this land up to and including 1931, that is: that sum has been paid from the time the Land and Water Company acquired it back from the settlers. The defendant company participated with the Gooding project in the construction of a new canal which would give the defendant company additional capacity for the

(Testimony of Harvey W. Hurlebaus.)

conveyance of water to lands on its project. The capacity of the original concrete section near the point of diversion, as approved by the State, was 3,200 second feet. We figured that about 3,100 second feet is a good measurement, and we figured 1,100 for the Gooding canal, making a total present carrying capacity of 4,200 second feet for the upper section where there are now two alternate canals. Our Engineering Department figured 3,783 second feet necessary to make a 100% delivery, and that leaves an excess of 417 second feet. That is to say, with these two canals for the diversion of water at the upper section, we can deliver at any one time more than 100% of the full water right for every settler on the project at the [180] same time. What I mean by the expression '100%' is one-eightieth of a cubic foot per acre per second of time. If the settler does not need that much it is cut down, but he is entitled to that much. That is considered 100%. The system will now deliver, or can deliver, in the neighborhood of 120%.

"The land listed in Exhibit No. 11 is about one-seventeenth of the total of the North Side Project acreage. There are 170,000 acres on the project. The acreage includes 12,000 acres under the pumping system. Roughly speaking, the lands listed in Exhibit No. 11 constitute one-seventeenth of the entire project.

"The total cost of the Gooding canal was about $353,000.00. That includes the cost of the siphons

(Testimony of Harvey W. Hurlebaus.)

and work on the main canal. The $353,000.00 is the total cost. If the lands listed in Exhibit No. 11 were to pay their pro rata share they would pay slightly over $20,000.00, not counting the interest.

"20,000 second feet of additional storage capacity were purchased at a cost of approximately $127,000.00.

"Mr. Shepherd was a member of the Board of Directors of the defendant company in the early days when he was president. He has not been a member since 1920."

(Redirect Examination of Mr. Hurlebaus)

"The water that has heretofore been referred to as the storage capacity was not always developed into water. The reservoir did not always fill. There were periods of time when we would have a carry-over of water from one year to another for irrigation on the North Side.

"The capacity of the canal system would enable the defendant company to deliver approximately 110%, rather than 120%." [181]

MR. W. A. HEISS,

a witness called on behalf of the defendant, being first duly sworn, testified as follows:

"My name is W. A. Heiss. I live at Jerome, Idaho. I am engaged in the real estate business. I have lived in Jerome approximately 30 years, and

(Testimony of Mr. W. A. Heiss.)

have been connected with the North Side Canal Company, Limited, as a director and as President of that company. I have served as a director for 12 or 15 years, and have served as President for 12 or 14 years. I have been in more or less regular attendance at the directors' meetings. I have known Mr. R. E. Shepherd since he first came to Idaho.

"I am conversant with the circumstances under which the 20,000 acre feet of water heretofore referred to was purchased. We bought it from the American Falls Reservoir District. Mr. Shepherd as President of the American Falls Reservoir District and manager of the canal company gave it first consideration. I don't remember exactly what year it was purchased, but the matter was discussed in our board meetings on more than one occasion when all of the board members were present. The reason for purchasing the water was because we were in need of it. We did not have sufficient water prior to the time of the purchase to give all the water users 100% delivery. We have not had enough water after the 20,000 acre feet were purchased to make a 100% delivery. We have acquired other water or water rights as a supplement. We have leased water from the Government. We now lease 150,000 acre feet capacity, or space, in the American Falls reservoir. Mr. Shepherd was general manager of the company, and he and the Board of Directors participated in the leasing of this 150,000 acre feet of storage capacity. The lease was effected

(Testimony of Mr. W. A. Heiss.)

six or eight years ago. Since the leasing of the 150,000 acre feet of storage capacity we have been able to make a 100% delivery to the water users at all times with the exception of one year. [182]

"The reason for the canal company participating in the construction of the Gooding canal was that their intake was not sufficient.

"Mr. Shepherd made recommendations for other improvements from time to time. In fact, he made a great many recommendations. One was for improving the system and enlarging it. Others were for fixing the gates at Wilson Lake, repairing Milner Dam, and then the Gooding ditch, dyking off the ponded areas, blowing off rocks in the main canal. Part of such improvements could be called maintenance but most of it was construction work.

"Mr. Shepherd and I constituted a committee to represent the defendant company during the negotiations for participation in the construction of the Gooding Canal. That part of the cost of the Gooding canal to be paid by the defendant company, and the cost of the additional 20,000 acre feet of water and the cost of leasing the 150,000 acre feet of storage capacity in the American Falls reservoir, had to be paid out of moneys collected by levies made against the lands on the project or the water stock.

"During the years when water was not actually delivered to the lands involved in this suit, not very much of the water allotted to those lands was de-

(Testimony of Mr. W. A. Heiss.)
livered to other lands on the project. When the natural flow comes along we generally have lots of water. It is available for everybody who wants water while it is coming down the river. If the water users don't use it it goes on down the river; but storage water is different. We can handle the storage water and hold it back, but the natural flow has to be used when it comes down, and we usually have plenty of it except near the end, when it pinches out rather fast. [183]

"The assessments are made against the outstanding shares of stock of the defendant company. Our water master, secretary-treasurer and the manager prepared the budget for the years 1935, 1936 and 1937. Mr. Stocking was the water master, Mr. Hurlebaus was the secretary-treasurer, and Mr. Shepherd was the general manager. There were no protests lodged by any representative of the bondholders, or of the Investment Company, or of the Land and Water Company, or of the Idaho Farms Company. Mr. Shepherd did not make any protest on behalf of any of those companies. Up until just a couple of years ago the offices of the Investment Company and the Land and Water Company and the defendant company were all in the basement of the hotel in Jerome. The canal company also maintained another office elsewhere up the street, where it collected the maintenance. The employees and officials of those three companies had desks in different places in one large room in the basement of the

(Testimony of Mr. W. A. Heiss.)

hotel, with the exception that Mr. Shepherd had a private room for himself.

"Mr. Shepherd was the manager of our company, and was also the manager of the other two companies. The defendant company's secretary was in the same office, and he was also affiliated with the other companies. And naturally they all worked together. The recommendations and improvements of the canal company's system from time to time came from the general manager and the water master. They would go over the system and recommend to the Board of Directors what they thought should be done."

Whereupon Mr. Stephan inquired:

"Q. Are there any other improvements still to be made to make this an average distribution system for an irrigation project?

"A. Yes, sir. [184]

"Mr. Snow: We object to this because the standard average of a distribution system is indefinite, and it is impossible to define it; and next, that this witness is not qualified to answer such a question.

"The Court: The objection is sustained.

"Mr. Haga: And may we have an exception?

"The Court: The exception is allowed.

"Q. Have recommendations been made for the system which have not been acted upon?

"Mr. Snow: Now, we object to this. It has no relation to the controversy here as to what may be done in the future.

(Testimony of Mr. W. A. Heiss.)

"The Court: That objection is sustained.

"Mr. Haga: May we have an exception to that ruling?

"The Court: The exception is allowed.

"Q. Will the distribution system have to be improved in any respect?

"Mr. Snow: We object to this. The witness is not qualified to answer and it is immaterial.

"The Court: Sustained.

"Mr. Haga: Exception, please.

"The Court: Exception allowed."

(Cross Examination)

"Q. Do you know the amount of land that has been irrigated under this project, and are under irrigation on this project, during the last three years?

"A. Well, all under irrigation except this twelve or thirteen thousand acres, and with a little exception.

"Q. Would you say there was as much as a hundred and forty thousand acres irrigated?

"A. Yes, sir; I think so. [185]

"Q. That would be about the maximum that was under irrigation in any one year?

"A. I would not say that, because I am not just sure about those figures.

"Q. There are other land owners besides those included in exhibit No. 11, not being irrigated?

"A. Not so many. I know of a very few pieces.

(Testimony of Mr. W. A. Heiss.)

"Q. Isn't there a lot of farms that have a certain amount of non-irrigable acreage?

"A. Yes.

"Q. And isn't about twelve per cent of the project taken up with roads and canals, and things of that sort?

"A. There is quite a percent.

"Q. As a matter of fact, you really think there has been any year in which there was a hundred and forty thousand acres irrigated?

"A. I don't take roads into consideration. We consider that if you have eighty acres, we figure the road and all.

"Q. And what was the fair amount of, or the actual amount of land irrigated and actually in crop?

"A. You mean exclusive of roads and barns and ditches?

"Q. Actually in crops?

"A. I cannot give you that. It is a matter of,——

"Q. —Don't you have the figures of the land in irrigation as president of the Canal Company?

"A. No, sir.

Mr. Stephan: We object to this as not proper cross examination.

The Court: I think he may answer that,—the answer is in, and it may stand. [186]

"Q. The amount of water that the canal will deliver is pretty largely dependent upon the way it is maintained, is it not?

(Testimony of Mr. W. A. Heiss.)

"A. Well, a great deal depends on how it was constructed and maintained.

"Q. And would you say that if moss was allowed to grow up, no matter what the capacity was, it would stop the flow?

"A. Well, I would say it would retard the flow.

"Q. You have an acute moss problem?

"A. Well, we have moss trouble all right.

"Q. And isn't that one of the acute problems?

"A. We had quite a little trouble until last summer, and we got machinery now, and kept it going last year.

"Q. If the moss is kept out of these canals the way it has been done last year they would have had a great deal larger delivery capacity?

"A. They would have a little more, but not a great deal.

"Q. Only a little more?

"A. Well, we have shut it out four or five days in July to kill the moss, and last year we didn't have to do that.

"Q. In the year 1934 that was a year of very low run-off in the Snake River?

"A. I think so.

"Q. It is the lowest year that you know anything about?

"A. Well, I don't know about that, but it was low, any how.

"Q. There was an acute water shortage that year all over southern Idaho?

(Testimony of Mr. W. A. Heiss.)

"A. That is right.

"Q. Did I understand that you said there was a carry-over of water in the reservoir in 1934, any water that you did not use? [187]

"A. Our report, and Lynn Crandall's report shows 12,396 feet.

"Q. At the end of the irrigation season of 1934 you had twelve thousand acre feet left over?

"A. That is what they claimed.

"Q. As a matter of fact on the project in that year you were without water for a considerable time?

"A. We might have been saving it, but we carried over 12,396 acre feet.

"Q. On what date was that?

"A. That was carried over in the fall.

"Q. Isn't it a fact that was water that accumulated in the fall, that you are computing it from October on?

"A. I think not. We use the natural flow that comes in late in the season.

"Q. I am asking whether that was the storage that accumulated in the fall after the irrigation season was over?

"A. I cannot answer that question.

"Q. As a matter of fact, you could have used a good deal more storage than you had in the irrigation season of 1934?

"A. I think so; yes.

"Q. The crops suffered that year?

(Testimony of Mr. W. A. Heiss.)

"A. Naturally.

"Q. During that year the lands on the project other than shown on plaintiff's exhibit No. 11 obtained all the water that would have gone to these lands, if they had been farmed?

"A. Yes; well if those lands were entitled to nineteen thousand second feet, we carried over twelve thousand and used the difference. That is the way I would figure it.

"Q. And what about the water appurtenant to these lands in connection with the stock, these shares that were appurtenant to the land by virtue of its ownership? [188]

"A. You mean the natural flow?

"Q. The natural flow and the Jackson Lake storage, or the leased water?

"A. Yes; the rest of them would get it out of the leased water and the Jackson Lake water.

"Q. Didn't they get the benefit of the natural flow?

"A. There is not much value to the natural flow to a Canal Company. That might be valuable to an individual because there is plenty, but to the Canal Company the natural flow is not very valuable.

"Q. And when did the natural flow right in 1934 go off?

"A. I don't know.

"Q. It went off as early as April?

"A. I don't know.

"Q. Don't you know anything about it?

(Testimony of Mr. W. A. Heiss.)

"A. I don't know the date.

"Q. Do you know that it was before May the first?

"A. I cannot say, but we have Mr. Stocking here and he probably can tell you that. I don't remember the date.

"Q. I want to know if it went early?

"A. Yes; it went off early. I will say that, but when, I don't know.

"Q. Prior to the time that it went off, you were using all of the natural flow available in the river under your proportion?

"A. Yes, sir.

"Q. And that included all of the natural flow appurtenant to these lands in exhibit No. 11?

"A. Yes, sir; as long as it lasted.

"Q. And what supply did you then have?

"A. Storage water.

"Q. These lands in exhibit No. 11 were entitled to their share of the storage water? [189]

"A. Yes, sir.

"Q. And it was used on the land of the other stockholders?

"A. We used a little.

"Q. Why did you hold it over?

"A. Well, we don't know how it is going to work out, and we will hold some over for the stock run.

"Q. If you hold it over you get the benefit the next year, don't you?

(Testimony of Mr. W. A. Heiss.)

"A. No; because the hold-over when the reservoir fills you lose it, and you cannot accumulate it because you only have so much space.

"Q. And did you exhaust the Jackson Lake water that year?

"A. I imagine so. In carrying over,——

"Q. —Isn't it a fact that you used upon the other lands of the project the water that was appurtenant to the lands in plaintiff's exhibit No. 11 just the same as if the Canal Company owned it?

"A. Certainly, we delivered the water right along, but that water is not ear-marked, and if we had more left over than this land was entitled to we used it.

"Q. Then you would say that the lands of the project, other than those in Exhibit No. 11, didn't receive any substantial benefit from the fact that these lands were not irrigated?

"A. Not as much as a lot of people would think.

"Q. If one-half of the land on the project had not been irrigated you think the other half would not have benefitted very much?

"Mr. Stephan: We object to that as being argumentative. [190]

"The Court: He may answer.

"A. Certainly; if you get it down to where it would be so small that it would be ridiculous, you cut it down small and then of course there would be plenty of water.

(Testimony of Mr. W. A. Heiss.)

"Q. In 1934 you purchased fifteen thousand acre feet from the Idaho Power Company?

"A. Yes, sir.

"Q. And you used all of that?

"A. Yes; I imagine so.

"Q. And the stockholders of the company, other than those lands shown in exhibit No. 11, obtained the benefit of that water?

"A. They paid for it, too.

"Q. In 1933 you had a hold-over of about a hundred and twenty-seven thousand feet?

"A. Yes.

"Q. And these lands had a proportionate share in that?

"A. Yes, sir.

"Q. And you used all of that in 1934?

"A. Yes, sir; all but twelve thousand acre feet.

"Q. During that year you leased about seventy-two thousand acre feet?

"A. Well, I haven't got those figures with me.

"Q. You know approximately that is correct?

"A. Yes; we leased some water.

"Q. And this leased water, if that had not been used,—or, I will put it this way: If these lands had been using water, they would have been entitled to their proportionate share of that water?

"A. If they had paid their maintenance charge.

"Q. And not having taken any of the water, the other stockholders would get the benefit of that?

[191]

(Testimony of Mr. W. A. Heiss.)

"A. They used the water, of course. It was not ear-marked, as I say. If it was left there it would be available for anyone who called for it.

"Q. In that year you acquired and used all the water belonging to the Hillsdale Irrigation District?

"A. Yes, sir.

"Q. And the same conditions as to the other stockholders using it would prevail as to that water?

"A. Yes, sir.

"Q. So when you refer to this nineteen thousand acre feet you were ignoring all of this water that I have mentioned previously?

"A. No; I didn't mean it that way. The water we leased that year and in various years is paid for out of the maintenance.

"Q. But what I refer to is this: I think that you stated that in that year the other lands of the project benefited only to the extent of 19,000 acre feet from the fact that these lands did not use water, and when you gave those figures you left out of consideration the hold-over from 1933 and the American Falls leased water, the Hillsdale water and the Jackson Lake storage water, and the purchase from the Idaho Power Company.

"Mr. Haga: I object to this line of questioning. He proceeds upon an erroneous theory that the land owner who does not pay his assessments can clear his account by saying, 'My water was used by the other land owners.' There is no basis in law for

(Testimony of Mr. W. A. Heiss.)

that contention. The law says that he shall pay his share, and he cannot trade water for what he didn't use, and say, 'You take that and I will not pay the maintenance.'

"Mr. Stephan: And we object also on the ground that the subject is a new matter. It appears on the face of the testimony that these were temporary leases of water, and the water was paid for in these years out of the maintenance paid solely and exclusive- [192] ly by the other users. These people have not paid anything since 1931.

(Argument of counsel.)

"The Court: I think he may answer.

"Mr. Haga: And we will have our exception?

"The Court: Yes; you will have your exception.

"A. I think it has been the plan of our Canal Company, as we understand it, an individual cannot hold over water in the American Falls reservoir, but a Canal Company can, so this is the water that was carried over the year before, and it became water of the Canal Company and not of the individuals.

"Mr. Snow: I move to strike the answer as not being responsive.

"The Court: I think it may stand, but, however, you may pursue it further, if you desire.

"Q. I asked you whether you did leave these things out, whether in the statement of nineteen thousand acre feet you left out those things?

"A. Left out what?

(Testimony of Mr. W. A. Heiss.)

"Q. Left out of consideration the waters from the sources that I have mentioned.

"A. We took that as a whole. They are all together.

"Q. Did you in saying that nineteen thousand acre feet was the total amount of water that was appurtenant to those lands for that year and used that year, didn't you leave out the Hillsdale water, the water purchased from the Idaho Power Company, and the Jackson Lake storage water?

"Mr. Stephan: We object to that for the reason that these people have not paid for any part of the Hillsdale water, or any other quantities of water for those years, denying any responsibility for leasing of this water.

"The Court: He may answer. [193]

"Mr. Stephan: Exception, please.

"The Court: You may have your exception.

"A. There is no question but what all of the leased water, and all of the water that we purchased is spread equally over the whole system. Everybody that pays the maintenance and has got a share of stock is entitled to their pro rata of the water. It is bought for the entire system.

"Q. And the other lands of the project used the water that would have gone to these lands if they had been drawing any water?

"A. Yes, sir; part of it.

"Q. In addition to that, these lands had water rights from another source than those I mentioned,

(Testimony of Mr. W. A. Heiss.)

water rights not represented by the shares of stock in the defendant company but represented by water rights in the American Falls Reservoir District and the canal in each of these years got the benefit of this year?

"A. They got that extra right, but I would not say that the Canal Company got the benefit of it, because we still had this carry-over in American Falls.

"Q. Isn't it a fact that the carry-over partly applied to the Hillsdale District?

"A. I am not just sure about that.

"Q. Didn't a part of it apply to the so-called pump unit?

"A. I think so, but I am not just sure how the water-master divided that up.

"Mr. Snow: That is all.

(Redirect Examination)

"A. Mr. Snow has inquired about the moss and the trouble on the main canal due to serious mossing trouble.

"A. Yes; there was quite a lot of trouble.

"Q. And what has that to do with it? That is, what has the moss to do with the trouble? [194]

"A. It slows up the flow.

"Q. Does the form or shape of the canal have anything to do with the collection of moss?

"A. I don't just understand that.

"Q. Do you have any serious difficulty in removing the moss in certain segments of the canal?

(Testimony of Mr. W. A. Heiss.)

"A. In lots of places we have no trouble.

"Q. And why is the difference? Why do you have more trouble in certain parts?

"A. Because of rocks and boulders.

"Q. Do you have any machinery for mossing the canal?

"A. Yes.

"Q. What is the nature of that machinery?

"A. It is a caterpillar tractor, and they put heavy chains, ship chains in the bottom and drag them.

"Q. Can you use that in the channel where the bottom is covered with boulders?

"A. It is hard.

"Q. Are there any places where you cannot use the caterpillar on the bank?

"A. There was scarcely any place on the bank we could use it until two years ago, when we started to bulldozing.

"Q. Is there any place that you don't have any banks for the canal?

"A. Lots of places.

"Q. And does the moss accumulate in the channel where you don't have a well-defined bank?

"A. Yes, sir.

"Q. Do you have trouble mossing along those segments?

"A. We have had to build a bank where we found we have to go around these places.

(Testimony of Mr. W. A. Heiss.)

"Q. And with reference to this storage capacity of a hundred and fifty thousand acre feet storage capacity, does that mean [195] a hundred and fifty thousand acre feet of water?

"A. No, sir.

"Q. What does it mean?

"A. When that reservoir fills to sixty-nine per cent,——

"Q. —Would that mean that you would get water to the extent of sixty-nine per cent of one hundred and fifty thousand acre feet?

"A. Yes, sir; that is correct.

"Q. Counsel for the plaintiff was asking about the leasing of water for certain years from the Hillsdale Irrigation District, the Idaho Power Company, and from other companies. I will ask you if during those years the plaintiff company paid any part of the purchase price of that water?

"A. Not on the lands in question here; they have other lands that they did pay on.

"Q. So far as the water that might have been used on the eleven thousand acres of land listed here, they paid no part of the rental, or the purchase price of the water?

"A. None at all.

"Mr. Stephan: That is all.

"Mr. Snow: That is all.

"The Court: In regard to the offers of Exhibits No. 38 and No. 39, the objection will be sustained.

"Mr. Stephan: And may we have an exception?

"The Court: Yes."

J. B. STOCKING,

called as a witness on behalf of defendant, and having been first duly sworn, testified as follows:

"My name is J. B. Stocking, and I live at Jerome, Idaho. I am water master for North Side Canal Company, Limited, and have held that position for 20 years last past. Prior to that time I was Carey Act engineer for the State of Idaho, and for seven years I was water master on the Salmon River project." [196]

"Q. I will ask you to state to the Court what other improvements will have to be made, if any, upon the distribution system of the North Side Project.

"Mr. Snow: We object to that as immaterial, and not involved in the years in question here. They are not made, and what may be done in the future is irrelevant to the issues here.

"The Court: What relief could the Court give you on that, when you say that you are limited to the three years that have been mentioned here?

"Mr. Snow: And I further object that there is no necessity of future expenses set up in these pleadings.

"The Court: The objection is sustained.

"Mr. Stephan: Exception."

Mr. Stocking continues:

"The Gooding canal was completed in the fall of 1929, and first used during the irrigation season

(Testimony of J. B. Stocking.)

of 1930. Defendant company is interested in the first three and one-half miles of this canal and paid 37% of the total cost of this portion. It was necessary to make this improvement for the reason that the first section of the intake canal then in use by the company has a retaining wall bordering on Snake River, and should this retaining wall break the project would be without water. The intake canal was first constructed to have a capacity of between 3100 and 3200 second feet, and in order to obtain 100% delivery for the project it is necessary to have an intake of from 3500 to 3600 second feet. Since the construction of the Gooding canal we have been able to deliver 100% of the water alloted to the lands on the project.

"In the fall of 1935 we had a carryover in American Falls reservoir of 24,474 acre feet to the credit of the Second and Third Segregations of the project. If the 11,000 acres of land involved [197] in this suit had used the water to which it was entitled we would have had a carryover of 20,000 acre feet. In 1936 there was a carryover of 301,520 acre feet in the reservoir to our credit. If the 11,000 acres of land involved in this suit had used the water to which it was entitled we would have had a carryover of 280,000 acre feet. In 1937 there was a carryover of 191,000 acre feet of water to our credit in the reservoir. If the lands in this controversy had used the water to which they were entitled we would

(Testimony of J. B. Stocking.)

have had a carryover of 170,000 acre feet to our credit.

"While Mr. R. E. Shepherd was general manager of the canal company he continually recommended the improvement and enlargement of the project. He suggested improvement work on Wilson Lake reservoir, enlarging the outlet of the same, and the removal of rocks from the main canal which serves the system. He recommended the instalment of permanent steel gates to replace the wooden ones then in use. Mr. Shepherd has never opposed any improvement which has been made on the system.

"Mr. Shepherd has at various times recommended the adoption of what is known as a "service basis" for the delivery of irrigation water on this project. A service basis is a canal which is large enough, and headgates which are large enough, so that an individual user may draw on it similar to drawing on a bank account if he wanted more money at any time: If he wanted more water at any time, he could get it, and could shut it off when it is not needed. As it is now, he has a continuous flow. It would require a larger system for a service basis.

"Irrigation water has been available for the land involved in this action, and if the maintenance had been paid and the request made for the water it would have been delivered in the same manner as to any other water user on the project. [198]

"When water is carried over in the American

(Testimony of J. B. Stocking.)

Falls reservoir from one year to another, and in the second year the reservoir fills and water spills over the dam, the carry-over is wiped out and no credit is received for the same. In years when the reservoir fills any carry-over we have does not ultimately benefit us.

"We first used water stored in American Falls reservoir in 1926, and our storage space in the reservoir has been filled five years since that time. In the year 1934 the canal company had to its credit a carry-over of approximately 12,000 acre feet, which had been held back for domestic purposes. In that year the fall run-off came earlier in the fall than we had anticipated, and supplied water for domestic purposes, and the 12,000 acre feet was not needed.

"The Hillsdale Irrigation District is an irrigation district which serves a portion of the lands on the First Segregation of the North Side Project. This district has its own storage right in American Falls reservoir, in addition to storage rights in Jackson Lake reservoir and a right to the use of the natural flow of Snake River. The North Side Canal company has a lease with the Hillsdale Irrigation District whereby if the board of directors of the Hillsdale Irrigation District decide in the spring of any year that the district will not need to use its water stored in the American Falls reservoir the canal company will purchase such storage. The storage water thus purchased by the canal com-

(Testimony of J. B. Stocking.)

pany is used by all of the water users on the Second and Third Segregations of the project."

Cross Examination

"Q. I think you stated in the year 1934 that you carried over twelve thousand acre feet for domestic purposes?

"A. Yes, sir.

"Q. As a matter of fact that was desperately needed for irrigation?

"A. '34 was a short water year.

"Q. And it was greatly needed for irrigation?

"A. It could have been used for irrigation. [199]

"Q. Isn't it a fact that you only had during the season from June the first on just a few days water delivery?

"A. No; we had more than that, but we were dependent entirely on traded water.

"Q. It didn't hold out?

"A. No, sir.

"Q. And you suffered for water all over the project?

"A. We needed more water.

"Q. The water was off a good deal of the time?

"A. At different times.

"Q. The fact that the water was held over in the fall by reason that you believed that you might need it more for domestic purposes, does not mean that it was a surplus of water that you didn't require for irrigation?

(Testimony of J. B. Stocking.)

"A. No, sir; it does not.

"Q. I think you said in 1936 you held over in the American Falls reservoir 301,000 feet?

"A. Yes.

"Q. And in 1937 you had a hold-over of 191,000 acre feet?

"A. Yes, sir.

"Q. You testified that this leased water was needed for the project. If you had that amount of hold-over that is needed now?

"A. May I qualify that by saying that the 301,-000 and the 191,000 acre feet, that was our total between the two reservoirs.

"Q. The Jackson Lake and the American Falls?

"A. Yes.

"Q. Do you think you need this leased water if you have that hold-over?

"A. I think we do. You have short water years every three or four years on the Snake River, and you have got to carry over from the good years to make up for the lean years. [200]

"Q. So this leased water is an insurance policy on exceedingly dry years?

"A. It was purchased as insurance water, but it is used very generally.

"Q. Of course, whenever you used this leased water you have used it on other land of the project other than the lands shown on plaintiff's exhibit No. 11, and the water would be appurtenant on this land?

(Testimony of J. B. Stocking.)

"A. It would be used on all the lands that apply *of* water, outside of Hillsdale.

"Q. By reason of having used all of that water, the other lands have required less water from the other sources?

"A. That is the way you would look at it.

"Q. Is there any other way to look at it?

"A. The lands that do not use the water, then, of course, it all goes into the jack-pot.

"Q. You spoke about some steel head-gates, this project has been in operation about twenty years?

"A. Longer than twenty years.

"Q. Thirty years?

"A. Yes.

"Q. Those wooden head-gates wear out in the course of operation?

"A. Yes, sir.

"Q. And you regard it as good economy to install steel head-gates so that they would not have to be replaced in ten or fifteen years?

"A. Yes, sir.

"Q. It is the economical method to put structures in well when you replace them?

"A. We expect them to be well put in." [201]

HARVEY W. HURLEBAUS,

recalled as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

"Mr. R. E. Shepherd was present at each of the meetings of the Board of Directors of the Canal Company at which the amount of the maintenance was set for the years 1935, 1936 and 1937. I have no record of any protest against any of the levies for these years.

"At the time of the construction of the American Falls reservoir, each settler on the project purchased a water right of 1.13 acre feet in the reservoir. Later on it was decided to build a bigger dam, and it was found that the unit cost was less, and therefore a refund was due to the settlers. Instead of taking a refund they took storage space, which gave them 50% more, and the individual storage right for each acre of land in the American Falls reservoir is 1.13 acre feet plus 50%, or 1.70 acre feet per acre. This does not include the 20,000 acre feet of storage right purchased by the canal company, and the 150,000 acre feet storage right which is leased by the canal company in American Falls reservoir."

Cross Examination.

"Q. The water in the American Falls reservoir that you referred to as individual purchases is in fact water that has been purchased by the American Falls Irrigation District, is it not, the reservoir district?

(Testimony of Harvey W. Hurlebaus.)

"A. Yes; the contract made through them.

"Q. And the defendant company has no interest in that water, has it?

"A. No; that is individual purchases. The only interest they have is distributing it.

"Q. And no part of the cost of that water has been paid by the defendant company?

"A. No, sir; that is the one and seventy one-hundredths, excepting, of course, in a few cases where they got title to the land, and they assumed that obligation, but the bulk of it is not. [202]

"Q. The only exception is the cases where the defendant company has foreclosed the maintenance liens or otherwise acquired title to the land, and they then became subject to the bond issue of the American Falls reservoir district?

"A. Yes, sir; a few cases of that kind.

"Q. And the American Falls water of the class that I have just been discussing, that is appurtenant to the lands listed in Exhibit No. 11 in this case, the land in controversy, and the stockholders of the Canal Company, other than the lands shown in that list, have been getting the benefit of that water for a good many years?

"A. Yes; excepting where there is a hold-over. That could be considered as that water.

"Q. That has been without cost or expense to the Canal Company?

"A. Just the cost of distribution. They have paid O. M. charges, but that is not a big item."

Defendant rests.

"Mr. Snow: We offer in evidence in rebuttal as plaintiff's exhibit No. 40, the judgment roll in the case of David W. Kassens, and other parties, plaintiffs, versus the Twin Falls North Side Land & Water Company and other parties, defendants, for the purpose of rebutting any evidence, if any there is, of loss of water rights represented by the shares of stock through abandonment, or non-user, and it is also for the purpose of rebutting any evidence, if any such there is introduced by the defendant, concerning the question of whether or not the Land & Water Company have complied with its obligations under the State's and settlers' contracts with respect to the completion of the system, and of all other obligations under various contracts.

"Mr. Stephan: We do not object because of any lack of certification, but we do object that it is incompetent, and irrelevant, [203] and immaterial, and does not throw any light on the issues here."

Whereupon, Plaintiff's Exhibit No. 40 was admitted in evidence, to which ruling counsel for defendant excepted and the exception granted by the court.

It is stipulated and agreed by counsel for the respective parties that the foregoing is the condensed statement of the evidence, in narrative form, submitted by counsel for appellant and filed with the Clerk of the court on the 26th day of September, 1938, as amended and modified at the request of

counsel for appellee, and the foregoing statement may now be taken and accepted by the Clerk as the statement of the evidence to be included in the record on appeal.

It is further stipulated that the Reporter's transcript of the evidence and proceedings at the trial, filed with the Clerk by appellant, shall be certified to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, with the exhibits in the cause, and may be referred to by the court and counsel with the same force and effect as if it were included in and a part of the foregoing statement of the evidence.

Dated this 12th day of December, 1938.

WAYNE A. BARCLAY
Residence: Jerome, Idaho
FRANK L. STEPHAN
Residence: Twin Falls, Idaho
J. H. BLANDFORD,
Residence: Twin Falls, Idaho
RICHARDS & HAGA
Residence: Boise, Idaho
Attorneys for Appellant, North Side Canal Company, Limited
EDWIN SNOW
Residence: Boise, Idaho
A. F. JAMES
Residence: Gooding, Idaho
Attorneys for Appellee, Idaho Farms Company

[Endorsed]: Filed Dec. 12, 1938. [204]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED STATES DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Idaho.—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 205 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein in the United States Circuit Court in accord with designation of contents of record on appeal of the appellant, as the same remains on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I have attached hereto and herewith transmit the original Statement of Evidence, as agreed to and stipulated by counsel.

I further certify that the fees of the Clerk of this court for preparing and certifying the foregoing typewritten record amount to the sum of $33.50, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 14th day of December, 1938.

[Seal] W. D. McREYNOLDS,
Clerk. [205]

[Endorsed]: No. 9049. United States Circuit Court of Appeals for the Ninth Circuit. North Side Canal Company, Limited, a corporation, Appellant, vs. Idaho Farms Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Filed December 17, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9049

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTH SIDE CANAL COMPANY, LIMITED,
a Corporation, *Appellant,*

vs.

IDAHO FARMS COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States, for the District of Idaho, Southern Division.

WAYNE A. BARCLAY,
Jerome, Idaho;

FRANK L. STEPHAN,
J. H. BLANDFORD,
Twin Falls, Idaho;

RICHARDS & HAGA,
Boise, Idaho,

Attorneys for Appellant.

FILED

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTH SIDE CANAL COMPANY, LIMITED,
a Corporation, *Appellant,*

vs.

IDAHO FARMS COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLANT

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WAYNE A. BARCLAY,
Jerome, Idaho;

FRANK L. STEPHAN,
J. H. BLANDFORD,
Twin Falls, Idaho;

RICHARDS & HAGA,
Boise, Idaho,

Attorneys for Appellant.

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TABLE OF CASES

TEXTBOOKS AND ENCYCLOPEDIAS

STATUTES

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTH SIDE CANAL COMPANY, LIMITED,
a Corporation, *Appellant,*

vs.

IDAHO FARMS COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLANT

STATEMENT AS TO JURISDICTION ON APPEAL

MAY IT PLEASE THE COURT:

Appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

District Court Had Jurisdiction:

Appellee is a Delaware corporation (Finding XII, R. 98).

Appellant is an Idaho corporation (R. 2, 31).

The requisite jurisdictional amount was alleged in the complaint (R. 2), and admitted by the answer (R. 31).

Jurisdiction of This Court:

This Court has jurisdiction of the appeal under Section 128, Judicial Code, as amended (Title 28, Section 225, U.S.C.).

The decree was dated and filed June 27, 1938 (R. 143, 134).

The notice of appeal was filed and the appeal perfected September 26, 1938 (R. 168).

There is, accordingly, diversity of citizenship. The case involves appellant's liens on approximately 11,000 acres of land aggregating at the time of the suit upwards of $40,000, exclusive of interest, and the right to make assessments in the future against such lands. The rights of both parties depend on the proper construction of certain statutes of the State of Idaho.

STATEMENT OF CASE

Appellee brought its suit on November 24, 1937, in the Court below to quiet its title to approximately 11,000 acres of land described in Exhibit No. 1 to the Findings of Fact and Conclusions of Law (R. 114-133), situated within what is commonly referred to as the "North Side Project."

Appellee alleges and appellant admits that appellee constructed the irrigation works for the reclamation of said lands and other lands, aggregating upwards of 170,000 acres, under that body of federal and state laws commonly referred to as the Carey Act, consisting of Sections 641 and 642 of Title 43, United States Code, and the laws of the State of Idaho passed in furtherance thereof and included in Sections 41-1701 to 41-1740, Idaho Code Annotated, 1932; that such irrigation works were constructed under contracts between appellee, then known as the Twin Falls North Side Land & Water Company, and the State of Idaho (Plaintiff's Exhibits Nos. 1, 2, and 3), dated, respect-

ively, April 15, 1907, August 21, 1907, and January 2, 1909 (R. 3).

It appears from the pleadings, findings, and evidence that appellee was organized on or about the month of April, 1907, under the name of Twin Falls North Side Land & Water Company, a Delaware corporation, for the purpose of promoting the development of said North Side Project; that about the same time its promoters also organized the Twin Falls North Side Investment Company, Limited, under the laws of Idaho for the purpose of developing townsites, building hotels, operating banks and making investments in connection with the development of said irrigation project (R. 227); that about December, 1936 (R. 204-207, Finding IX, R. 92-93), the Investment Company was merged under the laws of Delaware with the Twin Falls North Side Land and Water Company and the name of the latter changed to "Idaho Farms Company," appellee herein. Accordingly, appellee stands in the shoes of the merged corporations—Twin Falls North Side Land & Water Company and Twin Falls North Side Investment Company, Limited.

Appellant was organized by appellee pursuant to the provisions of the first contract (Plaintiff's Exhibit 1) between appellee and the State of Idaho, for the purpose of taking over the operation and maintenance of the irrigation works and distributing the water therefrom to the settlers, to whom appellee sold stock in appellant under contracts of sale conveying one share of stock for each acre of irrigable land entered by the settler. Under the terms of the state and settlers' contracts all the issued and outstanding capital stock in

the appellant company would be owned exclusively by the settlers or owners of land on the project. (Plaintiff's Exhibits Nos. 1, 2, and 3, and Exhibit A, attached to complaint, R. 21-30).

Appellee has acquired from the original purchasers, their grantees or assigns, the lands, water rights, and shares of stock involved in this suit, because of the failure of the settlers to pay the full consideration for the shares so purchased. As shown by the record, and particularly by Exhibit 1 to the Findings of Fact (R. 114-133), title to the land was acquired in some cases by the foreclosure of the settlers' contracts and sheriff's deeds, and in other cases by deeds from the settlers to appellee or its predecessors in interest. The exhibit referred to shows that the title was acquired by appellee or its predecessors in interest at various times, from 1911 till about 1928.

Appellant, in the proper performance of its duties, levied annual assessments against the lands pursuant to Sections 41-1901 to 41-1910, Idaho Code Annotated. Appellee paid all assessments levied to and including the year 1931, but it has not paid the assessments levied during the years 1932 to 1937, inclusive.

By the present action appellee seeks to quiet its title as against the assessments levied during 1935, 1936, and 1937, alleging as the basis therefor that the lands now held by appellee are *exempt* under the state law from assessments levied by appellant, until appellee has received payment in full for the water rights purchased for the irrigation thereof, including the amount paid out for taxes, court costs and cost of foreclosure and sheriff's commission on sale, etc.

The case involves the construction of certain statutes of the State of Idaho; particularly Section 41-1726, on which appellee rests its case, and Sections 41-1901 to 41-1910, inclusive, under which appellant's assessments were made; also other statutes which have a bearing on the construction of the statutes referred to, or which apply to certain issues arising under the pleadings in the case. The statutes are set out in full in an appendix to this brief, or quoted in the body of the brief.

From this general statement we now pass to a more detailed statement of the facts.

The answer sets up a number of defenses from which, as supplemented by the evidence or findings, it appears:

Same Questions Involved in Cases Pending in State Courts:

That at the time the present action was commenced by appellee there were pending in the District Court of the Eleventh Judicial District of the State of Idaho six actions in Jerome County and six actions in Gooding County in which appellant was plaintiff and in which appellee either was the only defendant or the real party in interest, all for the foreclosure by appellant of the liens for assessments made under Sections 41-1901 *et seq.*, against appellee's lands during the years 1932, 1933, and 1934; that in December, 1937, similar foreclosure suits were commenced by appellant against appellee on assessments made during 1935 and 1936; that all of such suits involve the identical questions that are involved in the case at bar, viz., the proper construction of the state statutes under which

the respective parties seek to sustain their respective rights or positions, and whether appellee's lands are exempt from assessments levied by appellant (R. 44-52).

The pendency of the actions referred to is not in controversy. The evidence on the point was uncontradicted (R. 214-217, Defendant's Exhibits Nos. 21 to 34, inc.).

It further appears that appellant obtained an injunction in the State Court (R. 49-50) against appellee from seeking to quiet its title in the present action as against the assessments levied by appellant during the years 1932, 1933, and 1934, and, for the foreclosure of which, suits had been commenced in the State Court prior to the commencement of this action in the Federal Court; that thereafter appellee amended its complaint in the Federal Court action so as to eliminate all reference to the assessments for those years.

Plea In Abatement:

Appellant plead the pendency of the actions in the State Court in abatement of the present action on the ground that appellee could set up in the actions pending in the State Court the question as to whether its lands are exempt from assessments under Sec. 41-1901, I.C.A., and therein seek the construction of the identical state statutes that are involved in the case at bar.

The Trial Court held the cases did not present the identical questions (R. 104, XVII), presumably because if the State Court held that appellee's lands were not exempt under the statute, there might be a difference in the mechanics of the filing or form of

the notice of lien, and that that would outweigh the preference that should be given to the State Courts in the construction of a state statute. We note, however, that the Court found that the liens were in proper form and had been filed as required by law and that the only question was the construction of the state statute (R. 99-103).

Trial Court Held Appellee's Lands Were Exempt From Assessment:

Appellee claimed, and the Court concluded as a matter of law (R. 111) and decreed (R. 135) that appellee's lands were *exempt* from assessments under Chapter 19, Title 41, Idaho Code, until the lands had been resold and appellee had received the full amount due it as shown by Exhibit No. 1 (R. 114-133), together with any additional taxes which appellee may hereafter pay.

Lien On Excess of Proceeds:

After having held that the lands and water rights were exempt from assessments levied by appellant, as stated above, the Court further held (R. 113, 137) that if any tract of land was sold for more than the amount due appellee, principal, interest, taxes and costs, the assessments which appellant levied during the years 1936 and 1937, but not during 1935, should "constitute a lien upon any excess moneys so received by plaintiff as proceeds of the sale of such tract or parcel of property" (R. 137).

Trial Court Overruled Defense of Estoppel:

Appellant in its third affirmative defense (R. 52)

and in its fifth affirmative defense (R. 54) pleaded, and it proved by the testimony of several witnesses (Hurlebaus, R. 224-243; Heiss, R. 243-247; Stocking, R. 262-265; Henderson, R. 220; Eaken, R. 221; Behrnes, R. 223, and Dorman, R. 223) that costly and necessary improvements had been made on the irrigation system by appellant, and large amounts expended for the rental and purchase of additional water rights and storage capacity in American Falls Reservoir, the aggregate of the expenditures so incurred being upwards of $670,000, exclusive of interest (R. 225-226); that such improvements and such additional water, water rights, and storage capacity were necessary and that they were made for the purpose of providing adequate service for all of appellant's stockholders, including appellee as the owner of the lands here in question; that Mr. R. E. Shepherd, president of appellee and manager of its predecessors from about 1913, and representative of the bondholders' committee from about 1913 to December, 1936, had recommended to appellant the making of such improvements, the purchase of such water rights and storage capacity, and the incurring of such obligations; that during practically all the period from January 2, 1917, to December 31, 1937 (R. 107), he was either president or manager of appellant and assisted in preparing its budgets of probable receipts and expenses, and in spreading the assessments over the lands of appellee here in question and other lands; that until the commencement of this suit appellee had not questioned the right of appellant to make assessments against appellee's lands; that all assessments levied from the time appellee first com-

menced to acquire the lands in question—1911 to and including 1931, were paid by appellee without protest or contest and without raising any question as to the right of appellant to levy such assessments, and without claiming that its lands were exempt therefrom.

Appellant claimed that the facts so pleaded and proven—there being no evidence to the contrary—constituted an estoppel and an acquiescence in appellant's construction of the statute under which the assessments were levied and a waiver of appellee's right to now contest the validity of the statute and the priority of the liens thereunder, but the Trial Court held that that the facts so stated did not constitute a defense to appellee's claim (R. 107-8, 113).

Suit to Quiet Title:

Appellant contended that this was a suit to quiet title and not a suit to determine the relative priority of the liens of appellant and appellee, and neither party sought to foreclose its lien in this suit, and foreclosure was not within the scope of the issues.

Merger:

Appellant claimed that there had been a merger of the legal and equitable title of appellee to the lands in question, some of which had been held for nearly twenty-five years; that when appellee took title through foreclosure, sheriff's deed, or by quitclaim deed from the owner, the original lien was merged with the legal title and could not be kept alive as a shield against future assessments levied by appellant. The Trial Court held otherwise.

Rulings On Evidence:

A number of exceptions were taken to the rulings on evidence. These will be found in the specification of errors and in other parts of the brief.

Ambiguity and Uncertainty in Provisions of Decree:

After holding that appellee's lands were exempt from assessments, the Court made some reference in the decree to a lien in favor of appellant for assessments levied during the years 1936 and 1937, "upon any excess moneys" received by appellee from the sale of the lands and water rights here in question (R. 137). It is appellant's contention that no adequate or suitable provision was made for protecting appellant's rights if it is entitled to a lien, as implied by the provision referred to, upon any excess moneys received by appellee from the sale of lands involved in this case.

SPECIFICATION OF ERRORS

Errors in Findings of Fact and Conclusions of Law:

1. The Court erred in finding and concluding (R. 110) that this suit should not be abated, or held in abeyance until the final determination of the suits pending in the State Court between these same parties and involving the same lands and the identical statutes, legal questions and rights involved in the present suit. The record clearly shows that there was no issue between the parties as to the form or contents of the liens or assessments, or as to the time and manner of filing; the controversy was wholly as to the construction of certain state statutes on which the decision of the Supreme Court of the state would be controlling in the Federal Courts.

2. The Court erred in finding and concluding that appellee, although the owner of the lands described in Exhibit No. 1 attached to the Findings (R. 114-133), has also some superior lien thereon under Section 41-1726, Idaho Code Annotated, and that there has not been a merger of the legal and equitable title but that the so-called Carey Act lien created by said section remains in force until appellee has received not only the original purchase price for the water right sold to the settlers, but also a lien under that statute for all taxes, costs of foreclosure, sheriff's commission on sale, etc., paid by appellee, and interest thereon, and that it may hold such lien not only to protect appellee against liens or claims intervening between its original lien and the acquisition of the legal title, but against liens thereafter levied under Chapter 19, Title 41, Idaho Code Annotated, for maintaining and operating said irrigation system and distributing water therefrom.

3. That the Court erred in holding, concluding and decreeing (R. 135) that appellant's lands were exempt from the lien of assessments levied by appellant under Chapter 19, Title 41, Idaho Code Annotated.

4. That the Court erred in finding and concluding (R. 94) that appellee is an agency and instrumentality of the bondholders for realizing upon assets that had been pledged and mortgaged to them for their security and that appellee's rights are enlarged and extended because its stockholders, or some of them, may at one time have been bondholders under the mortgage or trust deed at one time outstanding, but the lien of which has long since been released and discharged.

5. That the Court erred in finding and concluding (R. 113) that appellee was not estopped by its conduct and the conduct of its officers and managers, and barred by its laches from maintaining this action and that its long acquiescence in the validity of the assessments levied by appellant and payment thereof over a long period of years did not constitute a waiver of its right to now reverse its position and contest the construction that has for upwards of twenty years been placed on the statute by both appellant and appellee.

6. That the Court erred in finding and concluding (R. 109, 110, 113) that appellee's failure to use any water on its said lands for more than five years prior to the commencement of this suit did not constitute a loss and abandonment of its water rights for such lands.

7. That the Court erred in finding and concluding (R. 109) that appellee had provided an adequate water supply for the irrigation of all lands under said irrigation system, and that the expenditures which appellant had been compelled to make for the enlargement and improvement of the system and for the purchase of additional water rights and storage rights, were not due to or caused by the failure of appellee to provide an adequate irrigation system and an ample water supply; the evidence being clear and convincing and not contradicted that appellant, for the protection of its stockholders and at the urgent request of appellee's officers, has been compelled to spend upwards of $670,000 for the enlargement of the irrigation system and for the purchase of additional water and storage capacity.

8. That the Court erred in finding and concluding (R. 105-106) that the assessments levied against appellee's lands during the years 1935, 1936, and 1937, were offset by the fact that appellee had not used water for many years on such lands and that such water or part thereof had been used by other stockholders of appellant who received benefit therefrom.

9. That the Court erred in finding and concluding (Finding XVI, R. 104, and Conclusion of Law No. III, R. 110) that appellant's suits in the State District Court for Jerome and Gooding counties, commenced on or about December 24, 1937, to foreclose the lien for the assessments of 1935 and 1936, were not commenced in a proper Court, in view of the fact that the present action had shortly prior thereto been commenced in the Federal Court, and that the suit commenced in the State Court did not, therefore, protect appellant's rights or preserve the lien for the assessment for 1935; and in finding and deciding (R. 104) that "no evidence was admitted or received by the Court tending to show that any proceedings were commenced by defendant in a proper court to enforce the aforesaid liens"—such evidence was excluded by the Court because the foreclosure suit had not been commenced in the Federal Court (R. 218-219).

10. The Court erred in finding and concluding that the suits pending in the State Courts commenced by appellant for the foreclosure of its assessment liens for 1932 to 1934, inclusive, did not involve the same questions, controversies and issues as are involved in the case at bar and did not constitute a ground for abatement of this cause (Finding XVII, R. 104; Conclusion

of Law No. II, R. 110). It appears from the record that the Court decided the case in favor of appellee wholly upon the construction of the state statutes, and the identical statutes are involved in the cases pending in the State Court.

11. The Court erred in finding and concluding (Finding XVIII, R. 105) that there was no evidence showing the amount in the aggregate for the improvements made on the system during the years 1935 to 1937, inclusive. Appellant's evidence is uncontradicted as to the cost of such improvements and shows the amount thereof at the end of 1931 as over $471,000, and at the beginning of 1935 as over $331,000, exclusive of interest (R. 226, 243, and Reporter's Transcript filed with Clerk, pp. 153-154).

12. The Court erred in finding and concluding (Finding XX, R. 108) that the recommendations to appellant by R. E. Shepherd, and his acts and conduct were made as agent and officer of appellant and that although he was the manager of appellee and represented the bondholders' committee and their interests on the project during all of said period, his recommendations, acts and conduct do not furnish a basis for estoppel or waiver against appellee.

13. The Court erred in holding, concluding and decreeing (R. 111, 135), that if appellant had any lien whatever under the assessments for 1936 and 1937, such lien was only upon the excess of the proceeds from the sale by appellee of its lands, after deducting the full amount claimed by appellee as still due it on the original purchase price, plus interest, taxes, and Court

costs and other disbursements made by appellee in connection with such lands.

The Decision Is Against Law:

14. The findings, conclusions, and decree of the Court are against law, and particularly in this:

(a) That the Court erred in refusing and failing to follow the decision of the Supreme Court of Idaho as to the construction that should be placed on Section 41-1726, and on Chapter 19 of Title 41, and other sections of Idaho Code Annotated pertaining to the rights of the parties hereto, and especially in holding that the lien authorized by Section 41-1726 is prior and superior to the lien authorized by Chapter 19 of Title 41, Idaho Code Annotated;

(b) That the Court erred in holding that appelland did not protect its lien for 1935 assessment by the commencement of its action for the foreclosure of such lien in the State Courts for the proper counties, on the 24th day of December, 1937 (R. 104, 218-219;

(c) The Court erred in decreeing that the appellant had no lien on the lands in question, but only upon excess proceeds from the sale thereof (R. 135) and in providing that appellee was required to sell any of said lands to a purchaser offering to pay the amount due appellee (R. 142), thereby leaving no excess out of which appellant could recover on its assessments.

(d) The Court erred in making no provision for the protection of appellant or by which it may recover, either on account of assessments heretofore

levied or hereafter levied, as long as appellee owns the lands in question and although it may farm and use water thereon as other stockholders.

(e) That the decree is ambiguous and uncertain and impossible of enforcement so as to afford any protection whatever to appellant for recovering against the lands in question, the amount heretofore or hereafter extended for improvements on the irrigation system, and for the acquisition of additional water rights and storage capacity, all of which materially adds to the value of appellee's water rights.

(f) That the Court erred in holding and deciding that appellee could maintain a suit to quiet title to its lands when the real controversy was only as to whether appellee had a lien upon its own lands and whether such lien was prior or superior to the lien of appellant.

Errors in Ruling on Evidence:

15. The Court erred in overruling appellant's objection to appellee's questions and attempt to show on cross-examination of appellant's witnesses that stockholders of appellant have used, or had the opportunity of using, water which appellee did not use on the lands in question, and that such use would constitute an offset to the assessments levied by appellant against appellee's lands, to which appellant objected as follows:

> "I object to this line of questioning. He proceeds upon an erroneous theory that the land owner who does not pay his assessments can clear

his account by saying, 'My water was used by the other land owners.' There is no basis in law for that contention. The law says that he shall pay his share, and he can not trade water for what he didn't use, and say, 'You take that and I will not pay the maintenance." And we object also on the ground that the subject is a new matter. It appears on the face of the testimony that these were temporary leases of water, and the water was paid for in those years out of the maintenance paid solely and exclusively by the other users. These people have not paid anything since 1931" (R. 256-257).

16. The Court erred in sustaining appellee's objections to defendant's Exhibits Nos. 33 and 34, being certified copies of the records and files of actions pending in the State District Court for Jerome and Gooding counties, respectively, commenced on December 24, 1937, for the foreclosure of the liens of assessments levied during the years 1935 and 1936, to the introduction of which counsel for appellee objected as follows:

"It is conceded that the plaintiff is the owner of the liens described in this foreclosure suit. This suit we are involved in here was begun on the 24th day of November, 1937, and a month later, after the beginning of this suit, and after the record and files disclosed that appearance was made a suit was begun in another Court to foreclose these liens, and it is our theory that after this Court obtained jurisdiction of the subject matter of these liens no other Court was a proper

Court in which to begin any action for the foreclosing of the liens. The statute under which the foreclosure suit was begun provides as follows: 'No lien provided for in this chapter binds any land for a longer priod than two years after the filing of the statement mentioned in Section 41-1903, unless proceedings be commenced in a proper Court within that time to enforce such lien.' It provides that unless the action is begun to foreclose the lien within two years from the date of the filing of the lien, but in the statute it is called a statement, then the lien ceases, unless the foreclosure is begun in the proper Court, and we think that the record discloses on its face that the suit was not begun in the proper Court, and we object to Exhibits No. 33 and No. 34, and in connection with this objection I move to strike from the record the testimony of a similar suit in Gooding County. I was under the impression that the testimony was simply to identify the exhibits that he had before him, which I thought might be exhibits numbered 35 and 36, and as far as preserving any right of the defendant under the claim of lien, we think that any evidence in regard to the beginning of this suit is of no avail, and we object to the introduction of this, and move to strike the testimony regarding the suit number 3260 and 3261" (R. 218-219).

Whereupon the Court sustained the objection of counsel for appellee, and its motion to strike, to which rulings counsel for appellant duly excepted and the exception was allowed by the Court.

17. The Court erred in sustaining appellee's objections to the introduction of defendant's Exhibits Nos. 38 and 39 (R. 238-240), said exhibits being, respectively, a letter dated October 23, 1925, from appellant's secretary, to Messrs. Walters & Parry, general counsel for appellee and the bondholders' committee, relative to whether or not appellee should pay the assessments levied by appellant against a piece of land involved in this case, said letter having been submitted to counsel for appellee and its predecessors in interest for the purpose of ascertaining appellee's position relative to the payment of assessments so levied, and to which letter counsel replied on October 30, 1925, advising appellant in substance that the Twin Falls North Side Land & Water Company, the trustee for the bondholders, and Twin Falls North Side Investment Company, appellee's predecessors in interest, held the lands as any other private owner; that the lien of the Carey Act contracts no longer existed and that the lands were subject to assessments which should be paid by the company holding title thereto. To the introduction of these letters counsel for appellee objected as follows:

> "MR. SNOW: We object to the introduction for the following reasons: It is apparently a letter from E. A. Walters, who was Judge Walters, and it is dated October 30th, 1925, and it expressed an opinion as to one of the points in controversy in this case. In that year, 1925, there was in force at that time an opinion and decision of this Court which was apparently adverse, and in fact,

wholly adverse to the contention that plaintiff is now asserting, and subsequently on appeal the decision rendered by this Court was unanimously reversed, and thereafter it was reviewed by the Supreme Court of the United States, and on May 31st, 1927, the Supreme Court unanimously upheld the Circuit Court of Appeals, and the opinion I have reference to is the opinion of this Court which was erroneous and which Judge Walters followed, which in turn was declared to be entirely erroneous.

"MR. STEPHAN: I would like to correct Mr. Snow on that. I think this letter shows conclusively that the letter was written after the opinion was handed down from the Circuit Court of Appeals. Both the opinion of this Court and of the Circuit Court of Appeals was available to counsel and was considered by him at the time this opinion was written."

Appellee's objection was sustained by the Court and an exception granted appellant.

SUMMARY OF ARGUMENT

I

The Trial Court Should Have Sustained the Plea in Abatement:

1. The Federal Courts pass with reluctance upon a seriously controverted question as to the meaning of a state statute when no state court has construed the Act. While the decision of the Federal Court disposes of the particular case, it does not settle the issue of proper construction of the statute.

Thompson, et al., vs. Consolidated Gas Utilities Corp., 300 U.S. 55, 74, 81 L. Ed. 510, 520.

2. The decision of the Trial Court is based entirely upon the construction of the state statutes. The foreclosure suits brought by appellant against appellee in the State Courts, and therein pending when the case at bar was commenced, presented for construction the identical statutes involved in this suit, and every question and every right, urged by appellee in the case at bar, it can present in the suits so pending in the State Court. In view of the controlling effect of the construction of these statutes by the State Court, to the end that there may be no conflicting rules or conflicting decisions imposed upon appellant and other canal companies in the levying and collection of assessments, either upon individuals or water users on the same project or on different projects in the state, and in order to promote uniformity in the application of important statutes that affect thousands of water users throughout the state, the Trial Court should have invoked the rule of comity and sustained the plea in abatement.

City of Salem vs. Oregon-Washington Water Service Co., 144 Ore. 92, 23 Pac. (2d) 539, 544.

Covell vs. Heyman, 111 U.S. 176, 182, 28 L. Ed. 390, 392.

Kline vs. Burke Constr. Co., 260 U.S. 226, 67 L. Ed. 226.

Baltimore & O. R. Co. vs. Wabash R. Co. (C. C.A. 7), 119 F. 680.

Underground Electric Railways Co. vs. Owsley, et al. (C.C.A. 2), 176 F. 26, 38.

3. The cases in the State Court involve the same subject matter; the construction of the same statutes; the identical lands and water rights here involved; the same parties, and appellee's claim that the lands are exempt from assessment and its claim to a superior lien under Section 41-1726. A decision in favor of appellee in any one of the State Court cases on the points on which appellee relies in the case at bar would result in an annulment of appellant's liens and its right to make future assessments against appellee's lands. The decision in favor of appellee in the State Court would be more conclusive, broader and more far-reaching than a decision in the case at bar. In such cases the Federal Court should either sustain the plea in abatement or dismiss the case.

Matlock vs. Matlock, 87 Ore. 307, 170 Pac. 528.
7 R.C.L., pp. 1051 and 1067.
Beale on Conflict of Laws, Secs. 101.1 and 101.2.
Harkin vs. Brundage, 276 U.S. 36, 72 L.Ed. 457.
Farmers Loan & Trust Co. vs. Lake Street etc. Co., 177 U.S. 51, 44 L. Ed. 667.
Morgan Engineering Co. vs. General Castings Co. (C.C.A. 3), 177 F. 347.
Mound City Co. vs. Castleman, 177 F. 510.
Mound City Co. vs. Castleman (C.C.A. 8), 187 F. 921.

This Is a Suit to Quiet Appellee's Title:

4. This is not a suit to determine the amount and relative priorities of the liens claimed by appellee and

appellant, respectively. Appellee rests its case on its legal title and uses the alleged Carey Act lien as a protecting shield for the legal title. It can prevail only on the theory that its land was wholly exempt from assessments and not on the theory that it has a Carey Act lien which is prior and superior to the lien of the assessments levied by appellant.

5. Appellee did not seek to foreclose in this suit its alleged Carey Act lien. The case presented no issue under which the relative priorities of appellee's and appellant's liens could be determined, or for the foreclosure of the liens, and the sale of the land under the supervision of the Court, so that the proceeds could be disbursed and applied as in other foreclosure suits. The decree affords appellant no protection under recognized remedies and procedure of courts of equity if it is a case of both parties having liens against the land.

II

Appellee's Lands Are Not Exempt from Assessment:

6. An intention on the part of the Legislature to grant an exemption from assessments must be expressed in clear and unmistakable terms. When a privilege or exemption is claimed under a statute, it is to be construed strictly against the property owner. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption; it can not be made out by inference or implication but must appear beyond reasonable doubt from the language of the statute.

2 Cooley on Taxation (4th Ed.), Sec. 672.
Continental & Commercial Trust & Savings Bank vs. Werner, 36 Ida. 602, 215 Pac. 458.
Board of Directors vs. Board of Review, 248 Ill. 590, 94 N. E. 153.
Honolulu Rapid Tr. & L. Co. vs. Wilder, 211 U.S. 137, 53 L. Ed. 121.

III

Merger of Carey Act Lien and Legal Title:

7. The law of merger does not permit a party to occupy indefinitely the dual position of holder of the legal title and owner of a Carey Act lien on such title. The only exception to the law of merger is where there are intervening liens or encumbrances against which the prior lien may be preserved.

41 C.J., pp. 775, 780.
Thompson on Real Property, Sec. 4680 et seq.
2 Jones on Mortgages (8th Ed.), Sec. 1080.

8. When appellee foreclosed its lien for default by a settler in payment of the purchase price, it bid in the land and water rights at foreclosure sale in full satisfaction of the debt. It is elementary that the extinguishment of the debt, *ipso facto*, discharges the lien securing the same.

Henson vs. Henson, 151 Tenn. 137, 268 S.W. 378, 37 A.L.R. 1131, 1136.
2 Jones on Mortgages (8th Ed.), Sec. 950.
Shaner vs. Rathdrum State Bank, 29 Ida. 576, 161 Pac. 90.
41 C.J., p. 776.
10 R.C.L., p. 666.

IV

Appellant's Lien Takes Priority Over All Other Liens, Except the Lien of General Taxes:

9. Section 41-1901, Idaho Code Annotated, expressly declares that appellant's lien shall be "a first and prior lien, except as to the lien of taxes, upon the land to which such water and water rights are appurtenant," and that is the construction given to this statute by the Idaho Supreme Court.

Carlson-Lusk Hdwe. Co. vs. Kammann, 39 Ida. 654, 229 Pac. 85.

10. Assessments levied under statutes for the maintenance and operation of irrigation systems and public service enterprises are in the nature of taxes and take precedence over mortgages and other liens and encumbrances, unless the legislative intent clearly indicates otherwise.

61 C.J., pp. 68-75.

11. Assessments levied by irrigation districts for maintenance and operation of an irrigation system are taxes within the contemplation of a statute which makes general taxes a first lien on land, and such assessments have been held superior to an existing mortgage lien, even though there be no express statutory provision as to the rank of the lien for such assessment.

67 C.J., p. 1357.

12. The Idaho Supreme Court has expressly held that Section 41-1901, Idaho Code Annotated, does not impair the obligation of contract, although it gives to

liens created thereunder priority over mortgages executed prior to the assessment.

Fed. Land Bank of Spokane vs. Bissonnette, 51 Ida. 219, 4 Pac. (2d) 364.

Sanderson vs. Salmon River Canal Co., 45 Ida. 244, 263 Pac. 32.

13. Appellee's claim of lien under Section 41-1726 is, by the express provision of the statute, limited to priority over liens "created or attempted to be created by the owner and possessor of said land," and that is the construction placed on the statute by the Supreme Court of Idaho.

Continental & Commercial Trust & Savings Bank vs. Werner, 36 Ida. 602, 215 Pac. 458.

14. That an irrigation company shall have a prior lien on land for water service has been the established policy in the State of Idaho for over forty years. The statute applies to Carey Act projects such as appellant's.

Sec. 41-806, Idaho Code Annotated.

Adams vs. Twin Falls-Oakley Land & Water Co., 29 Ida. 357, 161 Pac. 322.

Blaine County Canal Co. vs. Hansen, 49 Ida. 649, 292 Pac. 240.

V

Appellee Was Not the Owner of Either the Land or the Water; It Was Only a Construction Company:

15. Appellee had no vendor's lien or purchase money mortgage on the land and water rights, and when it

bid in the land and water on foreclosure of its water contracts, or took title by quitclaim deed from settlers in settlement of their obligations, it did not acquire anything that it had originally held, and it does not now stand in the same position it did at the time, or prior to the time, it entered into the original settlers' contracts. When the irrigation works were completed and appellee released from further liability for the construction work, when all available water had been sold and the system transferred to appellant, the state contract had served its purpose.

16. Appellee as a construction company under the state contract was permitted, under the law, to appropriate the water in trust for the settlers on the proposed Carey Act project, but only for the purpose of transferring it to the settlers for their use and benefit in connection with the irrigation system to be constructed under the state and federal laws, commonly referred to as the Carey Act.

State and Robert Rayl vs. Twin Falls Salmon River Land & Water Co., 30 Ida. 41, 166 Pac. 220.

Adams vs. Twin Falls Oakley Land & Water Co., 29 Ida. 357, 161 Pac. 322.

State vs. Twin Falls Canal Co., 21 Ida. 410, 121 Pac. 1039.

Vinyard vs. North Side Canal Co., 38 Ida. 73, 223 Pac. 1072.

Idaho Irr. Co. vs. Pew, 26 Ida. 272, 141 Pac. 1099.

Idaho Irr. Co. vs. Lincoln County, 28 Ida. 98, 152 Pac. 1058.

17. When appellee foreclosed its water contract lien and purchased the land at foreclosure sale in satisfaction of the debt, or took title by deed in satisfaction of the debt, it took the land as any other purchaser or owner, stripped of its original status as a Carey Act construction company under a state contract, and it does not by such transactions become reinvested with the rights it occupied on the initiation of the project.

VI

Appellee Is Estopped from Contesting Validity of Assessments Levied by Appellant:

18. From 1911, when appellee first commenced to acquire the lands here involved until the commencement of this suit in November, 1937, it never protested or otherwise questioned the right of appellant to levy assessments against appellee's lands. The president of appellee, who from 1913 until 1937 was the general manager and directing head of appellee and the companies which were merged into it, and the representative of the bondholders' committee, recommended and urged appellant to make extensive enlargements and improvements on the irrigation system and to purchase water rights at an aggregate cost of more than half a million dollars, which could only be paid out of the assessments levied by appellant; he assisted in estimating the receipts from assessments spread over all the lands; he never questioned the right of appellant to levy assessments against the lands of appellee and of which he had general charge; he

authorized the payment of the assessments to and including 1931. Under the circumstances stated, the law of estoppel applies and appellee can not now be heard to repudiate a construction of the statute on which it has led appellant to rely.

19. It is settled law that a party may waive a statute and even a constitutional provision made for his benefit, and that having once done so he can not afterward ask for its protection.

1 Cooley on Constitutional Limitations (8th Ed.), p. 368.

In the matter of the application of Cooper, Mayor of New York City, 93 N.Y. 507.

Bacon vs. Rice, 14 Ida. 107, 119, 93 Pac. 511.

12 C.J., p. 769.

21 C.J., Secs. 221 and 247, under Estoppel.

Marine Iron Works vs. Weiss (C.C.A. 5), 148 Fed. 145, 153.

Sentenis vs. Ladew, 140 N.Y. 463, 35 N.E. 650.

Mayor etc. vs. Manhattan Ry. Co., 143 N.Y. 1, 26, 37 N. E. 494.

Hull vs. Hull, 158 N.Y.S. 743.

VII

The Trial Court Erroneously Rejected Appellant's Evidence That It Had Protected Its Lien for 1935 Assessment by Bringing the Foreclosure Suits in the State District Court:

20. The statute requires suits to foreclose the liens for the assessments levied by appellant to be commenced in the District Court for the county in which the land is situated.

Sections 41-1907, 5-401 and 9-101, Idaho Code Annotated.

21. Under the Idaho Constitution the District Courts have original jurisdiction in all cases, both at law and in equity.

Section 20, Art. V, Idaho Constitution.

22. The decision of the Trial Court in refusing to admit defendant's Exhibits No. 33 and No. 34 (R. 215-219), because the suits to foreclose the 1935 and 1936 assessment liens were commenced in the State District Court thirty days after the commencement of the present suit in the Federal Court but within two years after filing the statement required by Section 41-1903, was in effect a nullification of the provisions of the statute and constitutional provisions above referred to and deprived appellant of its lien for 1935, aggregating $10,092.36 (R. 236). The decision held the foreclosure proceedings in the State Court void and without force and effect, when it should in no event have gone farther than to enjoin the prosecution of the actions in the State Court pending the final determination of the suit in the Federal Court.

23. There is no authority in law for the Trial Court's action in holding that the assessments against appellee's lands should be annulled because appellee's failure to use its water resulted in some of appellant's stockholders using such water and receiving benefit therefrom. Such decision is directly contrary to the provisions of Section 41-1901, Idaho Code Annotated, that the assessments shall be levied and paid, regardless of whether water be or be not used on the land.

VIII

The Relation of Principal and Agent Exists Between a Client and His Attorney, and the Advice of the Attorney on Which the Client Acts and Which He Applies in the Making of Settlements and Adjustments Is Admissible for the Purpose of Explaining the Action and Intention of the Client, But Not as Evidence of the Law:

24. Defendant's Exhibits No. 38 and No. 39 (R. 238-240) were admissible in evidence for the purpose of showing that appellee intentionally and voluntarily paid the assessments from 1925 to 1931, inclusive, because it believed the assessment statute was valid, and for showing that it acquiesced in appellant's construction of the statute.

7 C.J.S., Sec. 67, p. 850.

2 Am. Jur., Sec. 208, p. 165.

5 Am. Jur., Secs. 67 and 71, pp. 298 and 301.

2 Mechem on Agency, Secs. 2150 and 2178.

Caterpillar Tractor Co. vs. Johnson, 99 Mont. 269, 43 Pac. (2d) 670.

Hansen vs. Hansen, 90 Mont. 597, 4 Pac. (2d) 1088.

Busey vs. Perkins, 168 Md. 19, 176 Atl. 474.

IX

The Decision of the United States Supreme Court in Portneuf-Marsh Canal Co. vs. Brown, 274 U. S. 630, 71 L. Ed. 1243, Was Based Upon Different Facts and Upon Statutes Not Here Involved, and Is Not Controlling in This Case:

25. It is settled law that the statutes and common law of a state and the decisions of its highest court in construing the same, constitute the rule of decision in the Federal Courts.

Section 725, Title 28, United States Code.
Erie R.R. Co. vs. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817.

26. The assessments levied by the canal company in the Portneuf-Marsh case depended for their validity upon the by-laws of the canal company and the contractual relations between the canal company and the construction company and between the construction company and the settlers. The case did not involve assessments levied under Chapter 19, Title 41, Idaho Code Annotated, but under a provision in the Business Corporation Law, which permitted a corporation, if not prohibited by the by-laws, articles of incorporation or by any contractual relation between the company and its shareholders, to make assessments upon the outstanding stock for the purpose of paying corporate indebtedness. The statute permitted the corporation to sell the stock if the assessment was not paid within the time required. The sale of the stock did not carry with it the land subject to the Carey Act lien, but it separated the water, evidenced by the stock, from the land to which it had been made appurtenant. Taking the water from the land was obviously contrary to both the spirit and the letter of the state and federal laws relating to Carey Act projects, for the lands had been patented to the state on its proof that it had made available a permanent water supply for the reclamation of the land. The Supreme Court construed Section 41-1726, but that construction is contrary to the construction that has been placed upon that section by the Supreme Court of Idaho.

Continental Commercial Trust & Savings Bank vs. Werner, 36 Ida. 602, 215 Pac. 458.

X

Appellee's Right to Water Has Been Lost by Non-User for More Than Five Years:

27. Appellee proved (R.208) and the Court found (R. 106) that no water had been used on appellant's lands from the date they were acquired by appellee and its predecessors in interest, as shown by Exhibit No. 1, attached to the Findings. The Court's Conclusion of Law (VIII, R. 113) that such failure to use had not resulted in abandonment of the water by non-user is contrary to the provision of Section 41-216, Idaho Code Annotated, that "all rights to the use of water acquired under this chapter or otherwise shall be lost and abandoned by a failure for the term of five years to apply it to the beneficial use for which it was appropriated."

XI

There Is Ample Evidence in the Record as to the Amount Expended by Appellant with Appellee's Approval and on Its Recommendation and Suggestions for the Enlargement of the Irrigation System and the Purchase of Water Rights and Storage Capacity:

Record, pp. 226, 243.

Reporter's typewritten transcript of record on file with Clerk, pp. 153, 154.

ARGUMENT

We deem it unnecessary to state at length before this Court the procedure followed in the promotion

and development of Carey Act irrigation projects in Idaho. That has been fully stated, and many of the provisions of the law construed, in numerous decisions of this Court, including the following:

Twin Falls-Salmon River Land & Water Co. vs. Caldwell, 242 F. 177.
Idaho Irr. Co. vs. Gooding, 285 F. 453.
Twin Falls-Salmon River Land & Water Co. vs. Davis, 267 F. 382.
Twin Falls-Salmon River Land & Water Co. vs. Caldwell, 272 F. 356.
Commonwealth Trust Co. vs. Smith, 273 F. 1.
Glavin vs. Commonwealth Trust Co., 295 F. 103.
Twin Falls-Oakley Land & Water Co. vs. Martens, 271 F. 428.

In the case at bar appellee was the promoting company, then known as the Twin Falls North Side Land & Water Co. As such its stockholders organized, as an affiliated company, the Twin Falls North Side Investment Company, Limited, which, as its name implies, was organized for investment purposes, and it engaged in numerous enterprises, including the building and operating of hotels, the owning of banks, promoting of townsites and selling town lots, etc. (R. 227, 298). These companies were merged into appellee (R. 203-7). Appellant was organized by appellee pursuant to the provisions of the state contract (Pltf's Ex. No. 1, R. 185). Appellee was originally the owner of all the capital stock of appellant, which in turn it

sold to settlers or entrymen on the Carey Act Land, on the basis of one share of stock for each acre of irrigable land (R. 185).

The state contracts specifically provided that upon completion of the irrigation system the same should be transferred to appellant, which should have the management and control thereof, and deliver water to its shareholders who had entered or filed upon the Carey Act land, or acquired water rights in the irrigation system on the basis specified in the state contract (R. 186-187).

In order to avoid throwing the entire burden of maintaining the irrigation system on the settlers who promptly improved and developed their farms and established their homes on the project, and to avoid an undue advantage accruing to those who held their land for speculative purposes and did not proceed with improvement of their farms, and did not live on the project, the Legislature specifically provided in Chapter 19, Title 41, Idaho Code annotated (Sec. 41-1901, set out in the appendix to this brief, originally adopted as Chapter 120, Session Laws 1913, and effective from the date of its approval on March 11, 1913), that operating companies such as appellant, the control of which is vested in those entitled to the use of water from the irrigation system:

> "shall have the right to levy and collect from the holders or owners of all land to which the water and water rights belonging to or diverted by said irrigation works are dedicated or appurtenant, regardless of whether water is used by such owner

> or holder, or on or for his land * * * reasonable tolls, assessments and charges for the purpose of maintaining and operating such irrigation works and conducting the business of such company."

Appellee acquired its lands by foreclosure of water contracts, sheriff's deed, or quitclaim deed from the settlers who defaulted in payments under their contracts with appellee, between 1911 and about 1928 (R. 114-133). It is admitted that appellee has paid all assessments levied under the statute to and including 1931; that suits for the foreclosure of the assessments for 1932, 1933, and 1934 are pending in the proper State Court; that appellant filed suit in December, 1937, for the foreclosure of the 1935 and 1936 liens in the proper State Courts; that in such suits appellee can set up any defense which it may have and assert every right which it can assert in the case at bar.

It seems obvious that the principal, if not the sole reason why appellee commenced the present suit in the Federal Court was to avoid a construction by the State Court of the state statutes that determine the rights of both appellee and appellant in the case at bar. Appellee is fully aware that it would only be necessary to try one of the cases pending in the State Court; that when the Supreme Court of the state determines the construction that should be placed on the statute on which appellee relies (Sec. 41-1726) and the statutes under which appellant levied the assessments (Secs. 41-1901, et seq.), it is a simple matter

for the parties to determine what amount, if any, appellee owes on the unpaid assessments, and to proceed accordingly to either cancel the assessments, if appellee prevails, or enter decrees of foreclosure and sell the land if appellant prevails and appellee refuses to pay.

In the case at bar the Trial Court found as follows, with reference to appellant's liens for 1935, 1936, and 1937:

> "That said claim of lien was in all respects in conformity with and as required by Section 41-1903, Idaho Code Annotated" (R. 100, 101, 103).

The record shows that no contest whatever was made on the mechanics used or procedure followed by appellant in acquiring and establishing its lien. The contest was on the construction of the state statutes and as to whether appellee's lands were, by Section 41-1726, exempt from assessments levied by appellant. The subject matter of the suit was the construction of the state statute and as to whether appellant had any right, in the past or in the future to impose assessments on appellee's lands for maintaining and operating the irrigation system.

Appellant pleaded several defenses. We shall first consider the plea in abatement, for, if that be sustained, there is no occasion for the Court passing on any of the other questions presented by the record.

I

The Trial Court Should Have Sustained the Plea in Abatement:
(Specification of Errors Nos. 1 and 10)

It is elementary law that the construction of this statute by the highest Court of the state will be the controlling authority for operating companies in levying assessments. If there should be conflict between the decision of the Federal Court and that of the Supreme Court of the state, the decision of the Federal Court would only settle the question as to the particular landowner who is a party to the suit. As to all other landowners on the same project, the decision of the State Court would control. In the interest of harmony and uniformity in the administration of the law, it would be most unfortunate to have conflicting constructions and decisions on such an important statute. If there were no other reasons for abating the action, we think that in itself would be sufficient for the Federal Court, exercising its discretion under the rule of comity, to refuse to proceed with the case until one of the cases in the State Court has been decided by the Supreme Court of the state.

In this case, however, we submit that the stay of proceedings in the Federal Court on the plea in abatement is more than a matter of discretion. The suits pending in the State Court for foreclosure of appellant's liens for the 1932, 1933, and 1934 assessments are proceedings *in rem*. The statute under which the assessments were levied is a part of appellant's lien and must be construed in order to determine the extent or dignity of the lien. The statute under which appellee claims is a part of its so-called Carey Act

lien. The status of its lands, as to whether they are exempt or not exempt from appellant's assessments, depends on the construction of the state statute under which appellee claims protection. The construction of the state statutes is a part of the subject matter of the forclosure suits.

The Supreme Court of Oregon, in Matlock vs. Matlock, 87 Ore. 307, 170 Pac. 528, held that a divorce proceeding, in so far as it fixes the status of the parties, is a proceeding *in rem*, and that the Court which first acquires jurisdiction is entitled to retain it till final conclusion.

Appellee persuaded the Trial Court to hold that the assessments for 1935, 1936, and 1937 presented a different subject matter, a different *res*, than the foreclosure suits for 1932, 1933, and 1934. We think that contention is wrong. It takes too narrow a view of what is involved in the suits in the State Court and in the case at bar. The procedure for perfecting appellant's lien is inconsequential. There is no controversy as to the date, form, or contents of the liens or statements filed by appellant. The controversy is wholly as to their statutory effect on appellee's lands.

The Foreclosure of the Liens Is a Proceeding in Rem:

Section 41-1907 provides that the procedure for the foreclosure of the lien for assessments shall be substantially the same as the foreclosure of a real estate mortgage; but the foreclosure of a real estate mortgage may also involve the personal liability of a mortgagor or his successor in interest, whereas the lien for such assessments is exclusively against the land.

There is no personal liability for the payment of the lien authorized under Chapter 19, Title 41. The foreclosure is for the purpose of subjecting the land to sale for the payment of the charges embraced in the lien. It matters not whether the owner is a resident or non-resident; the land is subject to the lien and may be sold for the payment of the amount found due thereunder, but no personal judgment can be taken against the owner of the land. In the event judgment is obtained by appellant in the State Court actions, it will be entitled to have the land sold by the Sheriff to satisfy the judgment, and, for the purpose of making the judgment of the State Court effective, that Court is deemed to have at least constructive possession of the lands involved in the State Court action, and the lands, accordingly, are withdrawn from the jurisdiction, supervision or interference of the Federal Court in any action of actions involving the same parties and the same issues.

In the case of Freeman vs. Alderson, 119 U.S. 185, 7 Sup. Ct. 165, 30 L. Ed. 372, the Supreme Court said:

> "Actions in Rem, strictly considered, are proceedings against the property alone, treated as responsible for the claims asserted by the libellants or plaintiffs. The property itself is in such actions the defendant, * * *."

Beale, in his recent work on the conflict of laws, in discussing this subject says in Section 101.1:

> "The clearest case for the exercise of jurisdiction in rem is that for jurisdiction to determine the title to land."

And in Section 101.2, he says:

> "A lien upon the land may be judicially declared and enforced against a non-resident owner, since it is necessary to affect the land only."

In Heidritter vs. Elizabeth Oil Cloth Co., 112 U.S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729, in discussing the conflict of jurisdiction in an action to foreclose a mechanic's lien brought in the State Court of New Jersey after the property had been seized by an officer of the United States for an alleged offense against its laws and where both actions went to judgment and the property was sold under both judgments, and title was claimed by two different purchasers, the Court said:

> "Indeed so far as the proceedings in question sought to bind the land by enforcing the plaintiff's lien as a specific lien thereon, and to dispose of the premises in satisfaction thereof by a sale, they were substantially in rem, whether there was personal or merely constructive service of process upon the defendant owner. The kind of process and mode of service could be material only with reference to the nature of the judgment. He could
>
> be bound personally only by his coming or being brought personally within the jurisdiction of the Court. But the land might be bound, without actual service of process upon the owner, in cases where the only object of the proceeding was to enforce a claim against it specifically of a nature to bind the title. In such cases the land itself

> must be drawn within the jurisdiction of the Court, by some assertion of its control and power over it. This, as we have seen is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit."

The Court then discusses the matter of comity and conflict of jurisdiction between the two Courts and the rule that prevails in such cases, and adds:

> "That rule has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. It simply requires, as a matter of necessity and therefore of comity, that when the object of the action requires the control and dominion of the property involved in the litigation, that Court which first acquires possession of that dominion which is equivalent draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction."

Farmers Loan and Trust Co. vs. Lake Street Elevated R. Co., 177 U.S. 51, 44 L. Ed. 667, was a case for the foreclosure of a trust deed in the Federal Court; a suit was thereafter commenced in the State Court and the summons issued by the State Court was served prior to the service of the subpoena of the Federal Court. The Court in its opinion said:

"As between the immediate parties, in a proceeding in rem, jurisdiction must be regarded as attaching when the bill is filed and process has issued, and where, as was the case here the process is subsequently duly served, in accordance with the rules of practice of the Court.

"The defendants could not defeat jurisdiction thus acquired, and supplant the case, by bringing suit in another Court and procuring an ex parte injunction seeking to restrain the service of process already issued.

"As, then, the bill of foreclosure had been filed in the Circuit Court of the United States and the jurisdiction of that Court had thus attached before the commencement of the suit in the State Court, it follows upon principle and authority that it was not competent for the State Court to interfere by injunction or otherwise with the proceedings in the Federal Court.

"The possession of the *res* vests the Court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other Courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between Courts whose jurisdiction embraces the same subjects and persons.

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another Court, but it often applies

> as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where in the progress of the litigation, the Court may be compelled to assume the possession and control of the property to be affected."

The decision perhaps most frequently cited in late years is that of Kline vs. Burke Construction Co., 260 U.S. 226, 67 L. Ed. 226. In that case the Construction Company brought an action in the Federal Court in Arkansas against the petitioners (Kline, et al.) for breach of contract; after the commencement of that action the petitioners, Kline and others, instituted a suit in equity against the Construction Company in a Chancery Court of Arkansas on the same contract and on the bond for its faithful performance, for an accounting and judgment for a large sum alleged to be due because of the abandonment of the contract by the Construction Company. The question arose as to the right of the Federal Court to enjoin the petitioners from prosecuting the action in the State Court, and the right to an injunction turned upon the question as to whether the suits were *in personam* or *in rem.* The Court there announced that the pendency of an action *in personam* in one jurisdiction does not preclude the institution of an action on the same cause in another jurisdiction but that in actions *in rem* neither State nor Federal Courts can exercise jurisdiction over the *res* after the jurisdiction of the Court of the other sovereignty has attached to it. The Court said:

"It is settled that where a Federal Court has first acquired jursidiction of the subject matter of a cause, it may enjoin the parties from proceeding in a State Court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the Federal Court. Where the action is *in rem*, the effect is to draw to the Federal Court the possession or control, actual or potential of the *res*, and the exercise by the State Court of jurisdiction over the same *res* necessarily impairs, and may defeat the jurisdiction of the Federal Court, already attached. The converse of the rule is equally true—that where the jurisdiction of the State Court has first attached, the Federal Court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the State Court's jurisdiction."

The Circuit Court of Appeals from the Third Circuit in Morgan Engineering Co. vs. General Castings Co., 177 Fed. 347, held that an action in a State Court of Pennsylvania for the foreclosure of a mechanic's lien brought the *res* within the jurisdiction of the State Court, and the Federal Court was therefore without jurisdiction to proceed with the later action commenced in the Federal Court. The opinion concludes with this statement:

"We are, therefore, of the opinion that, on the filing of this mechanic's lien in the State Court by the Morgan Engineering Company, that Court acquired jurisdiction of the subject-matter there-

of and the Circuit Court properly declined to oust said jurisdiction by issuing a Writ of Scire Facias on the lien."

In Mound City Co. vs. Castleman, et al., 177 Fed. 510, the Circuit Court was considering a suit to partition land in the state of Missouri. Prior to the completion of service of summons on the various defendants a suit in equity was commenced in the United States Court. In discussing the priority of the suits and the jurisdiction of the Courts, the Court said:

> "It is a well-settled rule of law that the jurisdiction of the State Court over the res, i.e., the subject-matter of the partition of this land, was exclusive of that of every other Court subsequently undertaking to exercise such jurisdiction; this for the obvious reason that as the judgment to be rendered by the Court first in time to be effective must operate upon the land itself, the control and possession of which is essential to accomplish the very ends of the proceeding. (Citing authorities.) It is not essential to such exlusive jurisdiction that there should have been any actual seizure or specific lien fixed upon the land."

See also:

Hirsch vs. Independent Steel Co., 196 Fed. 104;
Dennison Brick & Tile Co. vs. Chicago Trust Co., 286 Fed. 818;
Covell vs. Heyman, 111 U.S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390.

The Circuit Court of Appeals of the Eighth Circuit in Boston vs. Acme Mines Corp. vs. Salina Canyon Coal Co., 3 Fed. (2nd) 729, held that a suit in the State Court to quiet title to coal lands in Utah was an action *in rem* and that the Federal Court was without jurisdiction to proceed with a later suit brought in that Court involving the same subject-matter and while the state suit was pending.

To the same effect is the decision in the case of Palmer vs. Texas, 212 U.S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435.

See also:

Hughes Federal Practice, Vol. I, p. 262, par. 336, on the subject "Conflict of Jurisdiction in suits in rem."

C.T.C. Investment Co. vs. Daniel Boone Coal Corp., 58 Fed. (2nd) 305;

Harkin vs. Brundage, 276 U.S. 36, 48 Sup. Ct. 268, 72 L. Ed. 457;

Guardian Trust Co. vs. Kansas City Southern Railroad Co., 146 Fed. 337, 76 C.C.A. 615.

Relying upon the foregoing authorities, it is our contention that the actions in State Court described in Appellant's Second Affirmative Defense (R. 50-52) are actions *in rem* or *quasi in rem*, and the State Court having acquired jurisdiction of the *res* by virtue of the commencement of those actions, in December of 1934, 1935, and 1936, respectively, has a right to continue its jurisdiction over the lands to the exclusion of any interference by the Federal Court, and the Court below should have respected the right of the State Court to

such exclusive jurisdiction and the plea in abatement should have been sustained.

II

Appellee's Lands Are Not Exempt From Assessments Levied by Appellant:

(Specification of Errors No. 3)

The Court in its Conclusions of Law (IV, R. 111), and in its decree (Par. II, R. 135), held and decreed that the lands of appellee, during the year 1935 and the years subsequent thereto, were "and are now exempt from the assessment liens of the defendant company." That is obviously the gist of the Court's decision and the basis upon which the decree rests.

No *exemption* from assessments is either expressed in or implied by Section 41-1726, on which appellee relies, and exemption is clearly contrary to both the letter and the spirit of Sections 41-1901, et seq., under which appellant's assessments were levied. It is therein expressly provided that a corporation like appellant,

> "shall have the right to levy and collect from the holders or owners of all land to which the water and water rights belonging to or diverted by said irrigation works are dedicated or appurtenant regardless of whether water is used by such owner or holder, or on or for his land; * * * reasonable tolls, assessemnts and charges for the purpose of maintaining and operating such irrigation works and conducting the business of such company, * * * and such company * * * shall have a first and prior lien, *except as to the lien of taxes* upon the land to which such water and water rights are appurtenant." (Our italics.)

This statute is so positive, direct and mandatory that the Trial Court said in its opinion (R. 164):

> "The defendant was required under the law to spread the assessments ratably over all the lands of the project regardless of the contention of the plaintiff * * * that its lands were exempt or not subject to assessment."

It is settled law that an intention on the part of the Legislature to grant an exemption from assessments or taxes must be expressed in clear and unmistakable terms. When a privilege or exemption from assessments is claimed under a statute, it is to be construed strictly against the property owner. Exemptions are never presumed. The right to exemption can not be made out by inferences or implications but must appear beyond reasonable doubt from the language of the statute.

2 Cooley on Taxation (4th Ed.), Sec. 672.
Board of Directors vs. Board of Review, 248 Ill. 590, 94 N.E. 153.
Honolulu Rapid Tr. & L. Co. vs. Wilder, 211 U.S. 137, 53 L. Ed. 121.

The rule stated above has been applied by the Supreme Court of Idaho to the statute under which appellee claims protection. That Court has held that the lien for taxes is superior to the so-called Carey Act lien, even though there is no express provision in the revenue statutes to that effect.

Continental & Commercial Trust & Savings Bank vs. Werner, 36 Ida. 602, 215 Pac. 458.

Assessments such as were levied by appellant under the express provisions of the statutes are in the nature of taxes and the law as to taxes applies to such assessments, except as otherwise expressly provided in the statutes.

61 C.J., pp. 68-75;
67 C.J., p. 1357.

Section 41-1901 makes but one exception to the priority of appellant's lien and that is "*except as to the lien of taxes.*" That clearly eliminates appellee's claim. The assessment statute is most comprehensive and complete. It subordinates liens of every nature, except for taxes.

We think appellee's claim to exemption is wholly without merit and not supported by any authority involving the construction of a statute like Section 41-1901.

III

Appellee's Alleged Carey Act Lien Was Merged in Its Legal Title:

Appellee, whether it acquired title through foreclosure or by quitclaim deed from the landowners who defaulted in their payments, took title in full satisfaction of the lien created by the contract, or the so-called Carey Act lien. Mr. Parry testified:

> "No attempt has been made to collect the unpaid balances on these water contracts, and the settler was not expected to pay further upon them. In foreclosing the water contracts these contracts were put in evidence in the case, and the usual

form of decree of foreclosure was obtained, after which order of sale issued and the usual sale was held. Judgment was taken in the aggregate amount of the unpaid principal with interest to the date of judgment and court costs. Taxes were not included in the judgment, and no taxes had ever been paid prior to the acquisition of the lands by foreclosure" (R. 207-208).

To further illustrate the general procedure, an abstract of title was introduced (Deft's. Ex. No. 37, R. 228). A complaint in foreclosure is set out in the abstract (R. 229-232) from which it appears that the foreclosing plaintiff declared the whole amount due, principal and interest, and added to that amount *maintenance charges* and interest thereon paid by the plaintiff—appellee—in that case aggregating $69.60 (R. 231). Plaintiff prayed for the usual decree in a foreclosure suit (R. 232), and the usual form of decree was entered (R. 233-234).

The sheriff's certificate of sale recites that the property was sold to the foreclosing plaintiff who bid therefor the full amount of principal, interest, *accumulated maintenance charges, interest thereon,* court costs, sheriff's costs and the sheriff's commission (R. 235-236), and thereupon a sheriff's deed was issued (R. 236) to the foreclosing plaintiff, who in that case was the trustee for the bondholders. The land involved in that foreclosure consisted of two forty-acre tracts embraced in water contract number 1102, set out at the top of page 115 of Exhibit I attached to the Court's Findings of Fact, and it will be noted that the amount given in

the column headed "Amount due at date of deed" is the amount for which the property was bid in at the foreclosure sale.

The record clearly shows that the land and water rights, with the settler's improvements, were accepted or bid in for the full amount of the judgment, and *that the debt was accordingly paid.* We may add that appellee has never contended otherwise. Under such state of facts, is it possible that appellee may still have a lien which it can hold indefinitely as a shield for the protection of the legal title which it thus acquired? The public records show the contracts and liens were paid by the sale of the land. There is no longer any record lien and nothing to show the land is not worth the amount of the bid, or why appellee bid more than the land was worth. The release of the lien is not by inference or implication but by appellee's overt and intentional act.

It is clear from the authorities that there can be no secret intention to keep a satisfied mortgage lien alive after the legal title has been acquired.

When the mortgage lien has not been satisfied and the legal title is vested in the mortgagee, the rule is as stated in 10 R.C.L., p. 667:

> "When the circumstances under which merger ordinarily takes place are shown, the burden rests upon him who alleges that there was no merger to prove a contrary intention or to prove facts and circumstances from which such an intention will be presumed."

In addition to the above, appellee's actions and conduct for about twenty years in paying assessments for

maintenance and operation on the property, and in selling or negotiating for the sale of the land and dealing with it *as absolute owner and not as mortgagee or lien claimant,* would seem to be conclusive against its claim of intention to keep its lien alive.

In 41 C.J., p. 775, the rule is stated thus:

> "Ordinarily, the purchase or acquisition of the equity of redemption in mortgaged premises by the mortgagee results in a merger of the two estates, vesting the mortgagee with the complete title, and putting an end to his rights or title under the mortgage. But to constitute a merger, the two estates or interests must unite in the same person in the same right, and the estate acquired must be nothing less than the complete legal title in fee, unencumbered with conditions or restrictive agreements, and not liable to be defeated because of fraud or undue influence, or on other grounds."

The only exception to the rule is where there are intervening liens or encumbrances. The rule in such cases is stated in 41 C.J., page 780, as follows:

> "Where necessary to enable the mortgagee to defend his rights under his mortgage against intervening liens of third persons, a merger will not be held to have resulted if his intention to that effect is shown, or if there is nothing to rebut the presumption that his intention corresponded with his interest; and so if he was ignorant of the existence of such intervening liens or encumbrances

> a merger will be prevented. A merger, however, has been held to result where the conveyance to the mortgagee results in a satisfaction of the mortgage debt and cancellation of the mortgage and the evidence clearly shows that to be the mortgagee's intention and that he knew at the time of the intervening judgments."

To the same effect is the rule as laid down in Thompson on "Real Property," Sec. 4680, et seq. In 2 Jones on "Mortgages" (8th Ed.), Sec. 1080, the text says:

> "In law a merger always takes place when a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate. The lesser estate is annihilated or merged in the greater."

In the case at bar there are no "intervening liens." The assessments on which defendant relies were levied long after plaintiff and its predecessors in interest acquired the legal title and long after the merger occurred.

When appellee foreclosed its lien, the latter was merged in the decree or judgment. The lien was extinguished by the decree and from thence on the decree became the measure of appellee's rights, and the sale satisfied the judgment.

The Supreme Court of Tennessee, in Henson vs. Henson, 268 S.W. 378, 37 A.L.R. 1131, 1136, in discussing the extinguishment of liens, says:

> "It is elementary that an extinguishment of the debt, *ipso facto*, discharges the lien to secure the same."

In Jones on Mortgages (8th Ed.), Vol. 2, p. 694, Par. 1216, the author says:

> "Generally upon a foreclosure sale of the property the mortgage debt is extinguished as to the amount of the purchase money, whether the sale be under a power or by a decree of a Court of Equity in a foreclosure suit, or upon a judgment for the debt. * * * If, upon a foreclosure sale duly made, the full amount of the mortgage debt, together with the expenses of the sale, be received, the mortgage debt is paid; * * *
>
> * * * * * * * * *
>
> "A foreclosure sale properly made, whether under a power or by decree of Court, discharges the mortgage lien if the whole estate be sold."

In the case of Shaner vs. Rathdrum State Bank, 29 Ida. 576, 161 Pac. 90, the Supreme Court of Idaho, among other things, said:

> "It is a well established rule of law that payment of an indebtedness may be made by the transfer to the mortgagee of the mortgaged premises. * * * A mortgage is an incident of the debt, and without obligation or liability, there is nothing to secure, consequently there can be no mortgage."

IV

If Appellee Has Any Lien Under Section 41-1726, Such Lien Is Subject and Subordinate to Appellant's Lien Under Chapter 19, Title 41.

[Specification of Errors Nos. 2, 4, 13, 14(a), (c), (d), (e)]

For the reasons hereinbefore stated, we submit that

appellee has no lien supported by Section 41-1726. Whatever lien appellee may at one time have had was merged with the legal title and fully satisfied and discharged. We note, however, that the Court apparently assumed that appellee was not the absolute owner of the lands in question, for it reached the conclusion that appellant's liens for the 1936 and 1937 assessments "are binding upon certain excess proceeds from the sale" of the lands (R. 111). And in Conclusion VI (R. 113) the Court further concludes that in case appellee shall sell any of the lands,

> "for an amount in excess of the sum shown as to such tract or parcel under the column headed 'Amount due at date of deed,' plus the further sum paid out for taxes by plaintiff thereon, which is shown opposite such tract under that column in 'Exhibit1 ' headed 'Taxes paid,' then the assessments levied by defendant for the years 1936 and 1937 * * * shall constitute a lien upon any excess moneys so received by plaintiff * * *."

A provision to the above effect was inserted in the decree (Par. IV, R. 137).

The foregoing provisions imply a qualified title in appellee and appear to be an attempt to give recognition to something in the nature of a lien in appellant. The provisions are obviously without any value whatsoever and directly contrary to the statute which gave appellant a lien on the land and water and not on the "moneys" which appellee may some time receive from the sale of the land. The value of the above provisions

is further depreciated or entirely annulled by the provision in Paragraph VIII of the decree (R. 142), that

> "upon application of any person desiring to purchase any of said parcels of property * * * at a price not less than the aggregate of the sums shown opposite the description of such parcel in said Exhibit (1), * * * *plaintiff shall sell the same to such applicant at such price* * * *." (Our italics.)

The Court thereby requires appellee to sell the land to the first person who offers to buy for the amount due appellee. Obviously, appellant's lien on the excess proceeds is only an illusion.

In contrast with the provision made in the decree in this case for appellant's protection, we desire to refer to the decisions of the Supreme Court of Idaho, as to the nature of the lien of assessments levied under Section 41-1901:

In the case of Carlson-Lusk Hardware Company vs. Kammann, 39 Ida. 654, 229 Pac. 85, the Court considered Chapter 18 and Chapter 19 of Title 41, Idaho Code Annotated, being Chapters 137 and 138 of the former Compiled Statutes. The Carlson-Lusk Hardware Company sought to foreclose a farm mortgage and it made the landowner and the North Side Canal Company—appellant here—parties defendant. The Canal Company set up its assessment lien but the proof in the case was such that the Court could not determine whether the canal company claimed a lien under what is now Chapter 18 or under Chapter 19,

Title 41. Referring to what is now Chapter 19, the Court said:

> "This chapter provides that the lien of the operating company shall be a first and prior lien, except as to the lien of taxes," * * *

Referring to Chapter 137, which applies to companies not controlled exclusively by the landowners, and which was intended to cover Carey Act projects before the completion of the construction company's contract and the turning over of the project to the operating company for operation, the Court says:

> "But this chapter (now Chapter 18) does not provide that such lien shall be prior to others then existing."

Again the Court says:

> "In the absence of express provision, a lien created by statute is subsequent to other liens which are prior in time * * *
>
> "The Legislature therefore has provided that in case of a Carey Act operating company which is actually controlled by the water users themselves, the lien of maintenance and operation assessments is under C.S., Chap. 138 (now Chapter 19) prior to all other liens save taxes; but that in case of a Carey Act operating company which is not so controlled by the water users and other stockholders, the lien of its assessments, under C.S., Chap. 137 (now Chapter 18) does not have priority over pre-existing liens."

In other words, the Court held that Sec. 41-1901 should be enforced according to its terms, and that the lien was prior to all liens except taxes.

Again the same Court, in Federal Land Bank of Spokane vs. Bissonnette, 51 Ida. 219, 4 Pac. (2d) 364, held that the lien under Chapter 19 of Title 41 was prior and superior to the mortgage held by the Land Bank, and recorded prior to the levy of the assessment. In Sanderson vs. Salmon River Canal Co., 45 Ida. 244, 263 Pac. 32, the Court further held that the assessment lien did not impair the obligation of contracts as to holders of liens prior in time to the levy of the assessment.

Whenever the question has come before the Idaho Court, it has construed Chap. 19, Title 41, as authorizing a lien prior to all other liens, except the lien for taxes.

Appellee does not rely upon a lien created by Sec. 41-1726, but upon the lien created by the water Contracts (Ex. A to its complaint, R. 21).

The Trial Court found (R. 88) that the water contracts "to the extent of the several amounts owing and unpaid thereon, respectively constituted a lien upon the lands and shares of stock in each severally described," and again, on page 89, the Court refers to the foreclosure proceedings for the enforcement and foreclosure of the liens created by the water contracts.

The water contract itself (R. 26) provides that the "purchaser does hereby grant, assign, transfer and set over by way of mortgage, or pledge to the company to secure the payments of the amounts due and to become due on the purchase price * * * any and

all interest, and all rights which he now has or which may hereafter accrue to him * * * for the purchase of the lands to which the water rights * * * are dedicated," and further that where he obtains legal title "he will, upon demand, execute to the Company, in proper form, a mortgage or deed of trust * * * which * * * shall be first lien upon the lands so mortgaged, superior to any and every encumbrance in favor of any persons whomsoever" (R. 27), thus showing clearly that the parties contemplated a mortgage lien, and nothing more.

Sec. 41-1726, in describing the lien which may be created on the Carey Act lands, says:

> *"Said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land."*

The language on its face seems too clear to require construction, and the Supreme Court of Idaho has specifically held that it means exactly what it says. In Continental & Commercial Trust & Savings Bank vs. Werner, 36 Ida. 602, 215 Pac. 458, the Court was required to determine whether such lien was prior or subordinate to the lien for taxes. Referring to this section the Court says:

> "Under C.S., Sec. 3019 (now 41-1726) the only liens to which the lien of a Carey Act contract is superior are those created or attempted to be created by the owner and possessor of the land and this is not a limitation upon the power of the sovereign to create a lien. A lien for taxes created

under the provisions of C.S., Sec. 3097, supra, is not one created by the owner and possessor of the land but by the sovereign."

"It does not follow that because the legislature failed to expressly declare that a lien for taxes is superior and prior to all other liens that such a lien should be subordinate" * * *

The Legislature, in Chapter 19, Title 41, did not leave to implication or construction the priority of the lien for assessments, but it expressly provided that such lien was prior to all other liens except the lien of taxes.

We have, therefore, a clear and positive construction by the Supreme Court of Idaho of the statutes under which appellant claims and under which appellee claims, and that construction is directly contrary to the conclusion reached by the Court below.

It may be argued that the lien under Sec. 41-1726 does not afford proper protection against involuntary liens, such as judgments and attachments based on unsecured indebtedness of the settler. That argument is without force because Sec. 41-1727 provides that the water contract "upon which the aforesaid lien is founded, shall be recorded in the office of the recorder of the county where said land is situated," and section 41-1728 provides that upon default the holder of the contract "may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right." These statutes were originally all in one section, and they afford full protection to the construction company.

It has been an established public policy in the State of Idaho for upwards of 44 years that an irrigation company shall have a prior lien on land for water service. That statute was in force before the enactment of what is now Sec. 41-1726. The statute referred to is what is now Sec. 41-806, Idaho Code Annotated. The Supreme Court of Idaho, in Adams vs. Twin Falls-Oakley Land & Water Co., 29 Ida. 357, 161 Pac. 322, and in Blaine County Canal Co. vs. Hansen, 49 Ida. 649, 292 Pac. 240, held that this statute applied to Carey Act operating companies and was available for their use. From the time of the adoption of this statute, all persons taking liens or mortgages on irrigated agricultural lands have been charged with notice of the fact that the laws of the state gave to the canal company a prior lien for the water used in the production of crops.

The Courts have held that the remedy under Sec. 41-1901, et seq., and under Sec. 41-806, are cumulative and a canal company may adopt and use either method. Under Sec. 41-806, however, it is necessary to record separate notices of lien for each individual and to foreclose in separate suits, and it only authorizes a lien for water actually delivered and used on the land. This led to the adoption of Chapter 19 of Title 41, which authorizes a lien, whether water be used or not, and which permits one claim of lien to be filed for all delinquent assessments, and permits the foreclosure of all liens in one suit. The later statute simplifies the procedure and reduces the expense.

Irrigation companies like appellant are engaged in an important public service recognized by numerous

state statutes. There is no constitutional inhibition against the Legislature vesting in such *quasi* public corporations the power to levy assessments on the lands within the project for the maintenance and operation of these large irrigation systems, constructed under state and federal regulations for the reclamation of the public domain.

Counsel for appellee have at times contended that appellee had a purchase money mortgage as if it had been the owner of the land and water before the contract with the settler was executed. That contention is without merit.

By numerous decisions of the State and Federal Courts it has been held, and is now firmly settled, that appellee was only a construction company; that the water appropriated for the project was not appellee's private property, but it was given a water permit *in trust* for the future settlers; that it served only as a conduit for transferring right to the use of water from the state to the settler; that the water evidenced by the permit was dedicated by the state to the entire project for the reclamation of the lands donated to the state when it made proof of their reclamation. Sec. 41-1726 merely authorizes a lien through which appellee may reimburse itself for the cost of constructing the irrigation works. The title to the land came from the federal government to the state and from the state to the settler and appellee had no interest whatever in the land until the settler executed a contract giving it a lien thereon. Appellee was not allowed to make any profit through the sale of water, that was the property of the state. Appellee merely

had a franchise from the state for the construction of irrigation works, and for the cost of constructing the works it was permitted to collect from the settlers the amounts specified in the state contracts.

A fairly comprehensive review of the law and public policy on this subject is set out in the case of State and Robert Rayl vs. Twin Falls-Salmon River Land and Water Co., 30 Ida. 41, 166 Pac. 220. On page 58 of the Idaho report the Court said:

> "The Construction Company was permitted, under the law, to appropriate the water, but only for the purpose of transferring it to the settlers for their use and benefit in connection with the irrigation system constructed by it;"

and on page 64:

> "The company building the works is a construction company only. It constructs the works and payment to it must be made from the lien fixed by law upon the land."

To the same effect are statements on pages 61, 63, 65, 68, and 77, and in:

> Adams vs. Twin Falls-Oakley Land and Water Co., 29 Ida. 357, 161 Pac. 322;
> State vs. Twin Falls Canal Company, 21 Ida. 410, 419, and 421, 121 Pac. 1039;
> Vinyard vs. North Side Canal Co., 38 Ida. 73, 82, 223 Pac. 1072;
> Idaho Irr. Co. vs. Pew, 26 Ida. 272, 141 Pac. 1099;

Idaho Irr. Co. vs. Lincoln County, 28 Ida. 98, 152 Pac. 1058.

The water is the property of the state.

Walbridge vs. Robinson, 22 Ida. 236, 125 Pac. 812.

We repeat, therefore, that appellee did not, until it received either a sheriff's deed or a deed from the settlers, own either the land or the water, and it accordingly does not have either a purchase money mortgage or a vendor's lien thereon.

There is no basis for the contention which appellee has at times made, that when it foreclosed its lien and purchased the land and water at foreclosure sale, or by quitclaim deed from the settlers, it again assumed the status or now occupies the same position which it did before the land was entered and the water rights sold to the settlers. That contention is erroneous in fact and unsound in law.

V

Appellee Is Estopped from Contesting Validity of Assessments Levied by Appellant:

(Specifications of Errors Nos. 5, 7, and 12)

The Court found (R. 107-108) that R. E. Shepherd, now president of appellee, from the year 1913 to December, 1936, was in charge of the interests of appellee and the Bondholders' Committee on the North Side Project; that from January 2, 1917, until May 1, 1920, he was president of appellant and was manager of appellant from about September 20, 1921, until March 31, 1937; that he assisted in preparing appellant's

annual budget of receipts and expenses, and in determining the amount of money required for carrying on appellant's business; that he attended the meetings of the board of directors where the budget was examined and discussed and assessments levied under Chapter 19, Title 41; that he advised and recommended such betterments and improvements as were made in the irrigation system; that he advised and recommended the leasing and purchasing of additional water; that he made no objections to the manner in which appellant's business was conducted or the amount of assessments levied; also (R. 106) that appellants paid all annual assessments levied against its lands to and including the year 1931.

The Court found (R. 108) that in all such matters said R. E. Shepherd "was acting as an agent and officer of defendant and on its behalf and not as agent or officer or on behalf of plaintiff or the said bondholders or any of their said agencies; that none of the foregoing facts nor any acts or conduct of said R. E. Shepherd constitute any estoppel against plaintiff's claims in this suit." Conclusion of Law No. VII (R. 113) is to the same effect.

The finding and conclusion of the Court that all of Mr. Shepherd's statements and acts were made as an officer of appellant and had no relation to and did not concern or affect the bondholders' committee or appellee, whose agent and representative he was on the project, and because of which he was elected to an official position in appellant's organization, is clearly too narrow a view of the law of estoppel and agency.

Mr. Hurlebaus testified (R. 225-227) that Mr. Shep-

herd attended not only the meetings of the directors of appellant but of its stockholders, and made recommendations to the directors and stockholders concerning the improvements on the system and urged the purchase and rental of additional water; that on his recommendations appellant contracted an obligation of $353,724.99 on new construction on what is known as the Gooding Canal and certain syphons; rented 150,000 acre feet of storage space in American Falls Reservoir at 12½ cents per acre foot per year for 10 years, making an annual cost of $18,750.00, or $187,500.00 for the period; purchased 20,000 acre feet of storage space in the same reservoir at a cost of $127,727.77, making in the aggregate obligations totaling $668,962.76, all of which was expended for the purpose of obtaining more water for appellee's lands and the lands of other shareholders and for providing a better water service and a more dependable water supply.

Mr. Heiss testified at length to the recommendations and activities of Mr. Shepherd regarding the above matters and other changes and improvements in the system. Referring to the expenditures made and the assessments levied by appellant, Mr. Heiss testified (R. 246) there were no protests ever lodged by Mr. Shepherd or by any representative of the bondholders, or by the Investment Company, the Land and Water Company, or by the Idaho Farms Company. There was no conflict in the evidence on these matters.

We note also, for the bearing it may have on other points in the case which we shall hereafter have occasion to refer to, that there was at all times the closest

cooperation and interlocking management on the part of appellee and appellant. As to that Mr. Heiss testified (R. 246):

> "Up until just a couple of years ago the offices of the Investment Company and the Land and Water Company and the defendant company were all in the basement of the hotel in Jerome. The Canal Company also maintained another office elsewhere up the street, where it collected the maintenance. The employees and officials of these three companies had desks in different places in one large room in the basement of the hotel, with the exception that Mr. Shepherd had a private room for himself."
>
> "Mr. Shepherd was the manager of our company and was also the manager of the other two companies. The defendant's secretary was in the same office, and he was also affiliated with the other companies. And naturally they all worked together."

Mr. Stocking, the water master of appellant, testified at some length as to Mr. Shepherd's recommendations for improvements in the system and the purchase of more water (R. 262-266).

The evidence is undisputed that until the complaint was filed in the case at bar appellee had not questioned the right of appellant to levy assessments against appellee's lands and collect them as provided by law. Appellee first defaulted in the payment of its assessments in 1932. Since then appellant, on the recommendation of Mr. Shepherd, purchased the 20,000 acre

feet of storage space at a cost of $127,737.77, and it has paid out annually, for the rental of water, $18,750. At the beginning of 1932, it owed $175,000 on the obligation for the construction of the Gooding Canal (R. 226-243 and typewritten transcript on file with Clerk, pp. 153 and 154). At the beginning of 1935 it owed $135,000 on the Gooding Canal and nearly $84,000 on the cost of the 20,000 acre feet of storage space (R. 226).

Appellee has for upwards of 20 years acquiesced in the construction of the assessment statute and encouraged the incurring of obligations which could only be paid by assessments under that statute. Without such improvements the whole distribution system would rapidly deteriorate and destroy the value of the water rights of shareholders such as appellee.

In 12 Corpus Juris, page 769, the law as to a waiver of legal rights by acqiescence in the construction of a statute is stated as follows:

> "A person may, by his acts or omission to act, waive a right which he might otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objections had not by prior acts precluded himself from being heard in opposition. Thus a person who has participated in proceedings under a statute, or who has acted under the statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detri-

ment of others, or who asserts rights under it, may not question its constitutionality."

To the same effect are:

21 C.J., Sec. 247, under Estoppel;
Bacon vs. Rice, 14 Idaho 107, 119, 93 Pac. 511.
Marine Iron Works vs. Weiss (C.C.A. 5), 148 Fed. 145, 153.

In 21 Corpus Juris, page 1216, Section 221, this text further says:

"Acquiescence as a defense has, generally speaking, a dual nature; it may, upon the one hand, rest upon the principle of ratification, and be denominated 'implied ratification,' or, upon the other hand, rest upon the principle of estoppel, and be denominated 'equitable estoppel.' Where a person with actual or constructive knowledge of the facts induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice. And this is so regardless of the particular intent of the party whose acquiescence induces action."

In 1 Cooley on Constitutional Limitations (8thEd.), page 368, the author says:

"There are cases where a law in its application to a particular case must be sustained, because the party who makes the objection has, by prior ac-

> tion, precluded himself from being heard against it. Where a constitutional provision is designed for the protection solely of the property rights of the citizens, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will."

The Court of Appeals of the State of New York, in the Matter of the Application of Cooper, Mayor of New York City, 93 N.Y. 507, said:

> "It is very well settled that a party may waive a statute and even a constitutional provision made for his benefit, and that having once done so he can not afterward ask for its protection."

This has been reaffirmed repeatedly by the New York Courts. See:

> Sentenis vs. Ladew, 140 N.Y. 463, 35 N.E. 650;
> Mayor, Etc. vs. Manhattan Ry. Co., 143 N.Y. 1, 26, 37 N.E. 494;
> Hull vs. Hull, 158 N.Y.S. 743.

In addition to appellee's acquiescence in the construction of the statute, it has by its acts and the conduct and statements of its officers, induced appellant to spread its assessments over appellee's lands and to assume obligations aggregating upwards of $669,000. These improvements and purchase of additional water have added materially to the value of appellee's stock and to the betterment of its water rights. It would be unconscionable and inequitable to permit appellant to reap such benefits at the expense of the other stockholders.

The rule of estoppel should have been applied to appellant, first, because it has waived its right under the statute to urge the construction for which it now contends, and, second, it has by its acts and its conduct led appellant into incurring large financial obligations at a time and under conditions which led appellant to believe that appellee would pay its full share of such obligations.

The statement of the Trial Court that all such representations were made by Mr. Shepherd as manager or as an officer of appellant would seem to be thoroughly unsound in view of the record. Mr. Shepherd was first and at all times the agent and officer of appellee and the Bondholders' Committee. The Court must assume he acted in good faith and that he did not take advantage of his dual position to obtain an advantage for appellee at the expense of appellant. If appellee did not approve the assessments it was Mr. Shepherd's duty as its officer, having full knowledge of the facts, to protest or so advise the officers or directors of appellant. Neither the law of corporations nor the law of agency furnishes a shield of protection to appellee.

VI

One Can Not in a Suit to Quiet Title Based on Allegations of Ownership, Convert the Action into One to Determine Priorities of Liens, without Any Supporting Allegations in the Complaint:

(Specification of Error No. 14 [f])

Appellee alleged (R. 16) that it was the owner in possession and entitled to the possession of all the property described in Exhibit 1 attached to the Findings of Fact. It did not allege or suggest that it brought

the suit as a lienholder and that it merely sought to determine the relative priority of its lien and appellant's lien.

The Trial Court stated in its opinion (R. 149) that it was a suit to quiet title and not to foreclose appellee's lien. But appellee did not rest its case on its legal title but upon a claimed exemption, based on the lien authorized under Sec. 41-1726. The proper procedure to determine the priority of two liens is in the foreclosure suit on one or the other of the liens involved.

VII

The Trial Court Erroneously Rejected Appellant's Evidence That It Had Protected Its Lien for 1935 Assessment by Bringing Foreclosure Suits in the State District Court:

(Specifications of Errors 9, 14 [b], and 16)

The Court found (Finding XVI, R. 104) that no evidence was admitted or received by the Court to show that any proceedings were commenced by the appellant in a proper Court to enforce the liens claimed by it for assessments for the years 1935, 1936, or 1937 or any of said liens against appellee's property. Said liens and the actions based on the 1935 and 1936 liens are described in paragraphs IV to XIII, inclusive, of appellant's answer (R. 40 to 46).

In its Conclusions of Law, the Court concluded that the lien for maintenance and operation for 1935 no longer binds any of appellee's property (F. III, R. 110). In its decree the Court decreed that the said lien for 1935 maintenance and operation was not binding upon appellee's lands and that appellee's lands may be sold free and clear of said lien (Decree, I and IV, R. 134, 136).

At the trial, Exhibits 33 and 34 were offered in evidence; the Court refused to admit the Exhibits over the objection of appellee (R. 219), and on motion of counsel for appellee the Court also struck the portion of Wayne Barclay's testimony to the effect that similar suits had been commenced in Gooding County, Idaho (R. 216, 217). It is our view that the actions commenced for the foreclosure of the liens for maintenance and operation costs for the years 1935 and 1936 had been properly commenced in the proper Courts. Section 41-1905 limits the time for the commencement of an action to foreclose the lien to two years.

Section 41-1907 provides for the foreclosure of liens for maintenance and operation costs by way of a civil action in the State District Courts and that the foreclosure action shall be the same as the foreclosure of a first real estate mortgage.

Section 5-401 provides that actions for the foreclosure of a mortgage on real property must be tried in the county in which the subject of the action or some part thereof is situated.

Under the provisions of Section 9-101:

> "There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. * * *"

Counsel for appellee argued to the Court that inasmuch as the actions to foreclose the 1935 and 1936 liens had been commenced in the State Courts after the commencement of this action in the Federal Court,

said State Court actions had not been commenced in a "proper court" (R. 218); that by the commencement of this action in the Federal Court, the Federal Court had acquired exclusive jurisdiction over the 1935 and 1936 liens and that actions to foreclose the same could not thereafter be legally commenced in any Court other than the Federal Court. Judge Cavanah accepted that theory and accordingly, as above stated, held that the actions to foreclose the 1935 and 1936 liens had not been properly commenced, and further that no actions for the foreclosure of those liens were then pending in the State Courts.

Appellant had not been enjoined from commencing the suits in the State Courts, and, assuming that this action was properly commenced in the Federal Court, it is our view that its pendency, of itself, is not a bar to the commencement of the actions to foreclose those liens in the State Courts. (See Note 65 in 15 C.J. 1163.)

15 C.J. 1152, Sec. 631, states the rule as follows:

> "Except as judgments of State Courts are subject to review by the Federal Supreme Court, or as actions originally brought in a State Court may be removed to a Federal Court, the Courts of the United States and of the various states are independent of each other, and the pendency of a suit in one of such Courts is not a bar to a suit in another such Court involving the same controversy, although as a matter of comity one of such Courts will not ordinarily determine a controversy of which another of such Courts has previously obtained jurisdiction."

The rule that where the same matter may be brought before courts of concurrent jurisdiction, the one first obtaining jurisdiction will retain jurisdiction until the controversy is fully determined does not go so far as to make the subsequent commencement of an action in another Court a nullity. It has never been extended that far. The rule of comity is not self-executing. It is not automatic. The rule must be invoked before it becomes effective. Where an action has been commenced in one Court and subsequent thereto another action involving the same issues and the same parties is commenced in another Court, and the rule of comity is then invoked, it is not put in operation retroactively so as to make the commencement of the second action illegal. The proper application of the rule would be for the Court in which the second action is commenced to abate said action until the Court first acquiring jurisdiction had an opportunity to fully adjudicate the issues of the case so as to avoid any unseemly conflict between the two Courts, or the Court first acquiring jurisdiction may enjoin the party from prosecuting the action in the other Court. See Marks vs. Marks, 75 Fed. 321. But such application or operation of the rule would not justify a Federal Court in finding that an action subsequently commenced in the State Court has not been properly commenced, or in finding that such actions were not then pending in the State Court.

The Idaho statutes having given the state district courts jurisdiction of suits for the foreclosure of liens for maintenance and operation assessments and the foreclosure complaints having been filed in the district

courts of Gooding and Jerome counties within two years from the date of filing the claims of liens for 1935 and 1936 delinquent assessments and before the rule of comity was invoked, the liens are kept alive and effective by such suits. Accordingly, Witness Wayne Barclay should have been permitted to testify concerning said suits, and the Court erred in finding that proceedings had not been commenced in a proper Court to foreclose said liens, and it likewise erred in concluding that the 1935 lien no longer binds any of appellee's lands, and it erred in decreeing that said lands may be sold free and clear of said lien.

Section 20 of Article V of the Idaho Constitution provides that:

> "SEC. 20. JURISDICTION OF DISTRICT COURT.—The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law."

Obviously, under the Constitution and the statutes of the state, the District Court had jurisdiction of the parties and of the subject matter, and it was the right, if not the duty, of appellant to commence its action in the District Court for the county in which the land is situated. The decision of the Trial Court in refusing to admit the evidence as to the commencement of these actions was, in effect, a nullification of the provisions of both the statutes and the Constitution. Appellant's lien for 1935 aggregated $10,092.36 (R. 236). This amount was stricken from its claim by the Court's ruling.

We submit that the actions were properly com-

menced in the State Court and that the proper procedure for appellee would have been to either remove the actions to the Federal Court, or obtain an order abating the proceedings in the State Court, or an order in the Federal Court enjoining appellant from prosecuting the actions if they involved the same subject matter as was involved in the suit in the Federal Court.

VIII

There Is No Authority in Law for Permitting a Water User to Offset Statutory Assessments for Maintenance and Operation by a Showing That He Did Not Use His Water, and That This Resulted in an Advantage to Other Stockholders.

(Specification of Errors Nos. 8 and 15)

The Court found (XVIII, R. 105, 106) that appellee had not used the water on its lands during any of the years for which the maintenance assessments are involved in this case, and that appellant and its stockholders had used such water and derived benefit therefrom and that such benefit would be an offset against the assessments. On the same theory it overruled appellant's objections to appellee's questions for the purpose of bringing out on cross-examination of appellant's witnesses, the extent to which other stockholders had used the water which appellee did not desire to use on its lands.

We think the finding of the Court and the ruling on the evidence (R. 256-257) are not only wrong as a matter of general law, but are directly contrary to the express provisions of Sec. 41-1901, et seq., under which appellant levied its assessments.

The statute expressly provides that the assessments shall be levied and paid, regardless of whether water be used or not. If the Court's ruling be correct, then every water user can evade the payment of assessments when he does not use his water by merely showing that the water may have been distributed to other stockholders and that some stockholders received some benefit, whether large or small, from the use of the water. That statute was intended to foreclose forever such contention by a water user who permits his land to lie idle while his neighbors improve theirs and build up the land values in the community. There was not a word of evidence as to the value that any stockholder derived from the use of appellee's water. The testimony of Mr. Heiss (R. 252-258) and Mr. Stocking (R. 266-267) shows clearly that it would be impossible to determine the value, and in years of ample water supply it obviously had no value.

It is elementary law that when a water user fails to use his water, it may be used without charge by other appropriators or water users. The Court's finding is not only contrary to law, but it is also entirely unsupported by the evidence. If appellee were permitted to show that the water was used by others, the record is wholly lacking as to the value of the use. But the statute expressly forbids the offset approved by the Court and claimed by appellee.

IX

The Court Erred in Holding That There Was No Evidence Showing the Amount of the Improvements and Expenditures Made on the Irrigation System and for the Rental and Purchase of Additional Water, Reservoir Capacity, and Storage Rights:

(Specification of Error No. 11)

The Court found (XVIII, R. 105) that certain improvements had been made on the irrigation system, and says:

> "No evidence appears showing the amount of such improvements done in the aggregate during the three-year period (1935 to 1937, inclusive) involved in this suit."

The finding presumably was intended to justify the conclusion that there were no equities in favor of appellant because of the expenditures it was led to make upon the recommendation of Mr. Shepherd, appellee's president and also manager of appellant, and which resulted in improving appellee's water right and increasing the value of its stock. The finding is not supported by the evidence. Mr. Hurlebaus showed in detail the extent of the expenditures (R. 226, 243, and Reporter's typewritten transcript on file with the Clerk, pp. 153-154). The expenditures made and obligations incurred aggregated approximately $669,000. They are set out in sufficient detail in our discussion on the question of estoppel in this brief. The Court's Finding is accordingly without any support from the evidence, for it shows clearly the amount of every important item.

X

Appellee's Right to Water Has Been Lost by Non-User for More Than Five Years:

(Specification of Error No. 6)

Appellee proved (R. 208) that "the land in question has not been farmed since its acquisition" and the Court found that appellee had used no water on its lands (R. 105), but it concluded (VIII, R. 113) that the water rights for appellee's lands had not been abandoned or forfeited through non-user.

The abandonment of the water right by non-user was pleaded as a defense by appellant (R. 58-59), and it was admitted by appellee that no water has been applied to beneficial use on these lands since they were acquired by appellee, as shown in Exhibit 1 (R. 114-133).

Section 41-216, Idaho Code Annotated, provides as follows:

> "All rights to the use of water acquired under this chapter or otherwise shall be lost and abandoned by a failure for the term of five years to apply it to the beneficial use for which it was appropriated, and when any right to the use of water shall be lost through non-user or abandonment such rights to such water shall revert to the state and be again subject to appropriation under this chapter."

We think the Court had no discretionary power to extend or enlarge the clear and positive provisions of the statute. The right to the use of water is granted

by the state on condition that the water be applied to beneficial use. If the grantee fails for a period of five years so to apply it, the condition is broken and the grant automatically fails and the water reverts to the state.

There would seem to be no authority for the finding and conclusion of the Court that appellee, in the face of its own statements and admissions of non-user, for as long, in some cases, as 25 years, may still hold its water right.

XI

The Relation of Principal and Agent Exists Between a Client and His Attorney, and the Advice of the Attorney on Which the Client Acts and Which He Applies in the Making of Settlements and Adjustments Is Admissible for the Purpose of Explaining the Action and Intention of the Client, But Not as Evidence of the Law:

(Specification of Error No. 17)

Appellant offered in evidence Exhibits 38 and 39 (R. 238-240) for the purpose of explaining appellee's action in paying assessments levied by appellant, and in making adjustments of maintenance charges against lands that were acquired by appellee through foreclosure, or by quitclaim deed from settlers, and for disproving the contention of appellee that it had paid maintenance and assessment charges as a sort of good will offering, and that it had not acquiesced in appellant's contention as to the meaning of the statute under which the assessments were levied.

The exhibits referred to consist (No. 38) of a letter dated October 23, 1925, from appellant's secretary,

Mr. Hurlebaus, to Messrs. Walters & Parry of Twin Falls, Idaho, counsel for the bondholders' committee and for the Twin Falls North Side Land & Water Company and the Twin Falls North Side Investment Company. The letter requested advice as to the basis on which the maintenance charges should be adjutsed or paid by the Investment Company in view of the decision in the Portneuf-Marsh case. The inquiry was specifically about Lot 2, Sec. 1, Twp. 9 S., R. 15 E., one of the tracts involved in the present action and set out on page 126 of the record, being line seven from the bottom of the tabulated statement on that page. It should be remembered that at that time all of the parties were occupying the same office and were closely affiliated, as testified to by Mr. Heiss (R. 246-247). Judge Walters replied (Ex. 39, R. 239) under date of October 30, 1925, and instructed appellant as to the basis on which maintenance charges against his clients should be adjusted, and the assessments and maintenance charges were thereafter paid on that basis by appellee, to and including the year 1931, and that basis was never questioned or protested until the commencement of this suit.

The exhibits referred to were excluded by the Court on the objection of counsel for appellee (R. 237-238).

We submit that the ruling of the Court was not correct and that the exhibits should have been admitted in evidence.

The relation of attorney and client is one of *agency*, governed by the general rules of law that apply to other agents.

7 C.J.S., Sec. 67, p. 850.

In 5 Am. Jur., Sec. 67, p. 298, the rule is stated as follows:

> "Where a relation of attorney and client exists, the client is bound, according to the ordinary rules of agency, by the acts of his attorney within the scope of the latter's authority, even though the attorney is without a license."

Again, on page 301, Sec. 71, it is said:

> "With regard to the effect upon a client of acts of his attorney done without express authority, the usual rule as to such acts of agents applies, and under some circumstances the client will be held to have ratified the unauthorized acts of its attorney or to be estopped to deny the latter's authority."

Other authorities to the same effect are cited in the summary of the argument under this head.

In the management of a case in Court a special rule of agency applies, but in other matters in which the attorney advises and counsels a client, or gives instructions to those who have dealings with his client, the ordinary law of agency applies.

That appellee and its predecessors ratified and approved the instructions or advice given by Judge Walters in Exhibit 39 is not contradicted. The Investment Company made settlement in accordance with the instructions of the attorney, and appellee and its predecessors for six years thereafter made settlements regularly and paid the assessments levied against the lands in question.

Again we submit that the exhibits should have been admitted in evidence and should have been considered by the Court in deciding the case. These exhibits have an important bearing on many issues in the case.

XII

The Portneuf-Marsh Valley Case:

Appellee rested its case on the decision in Porteuf-Marsh Valley Canal Co. vs. Brown, 274 U.S. 630, 71 L. Ed. 1243, and the Trial Court apparently was persuaded that the decision in that case would control the case at bar. We desire therefore to point out briefly the distinguishing features between the two cases and the reasons why the Portneuf-Marsh case, in our opinion, has no application except in its construction of Section 41-1726, Idaho Code Annotated, and as to that statute the Supreme Court of Idaho has held otherwise and against appellee's construction.

The Portneuf-Marsh case did not involve assessments levied under Chapter 19, Title 41, on which appellant relies. It involved none of the questions discussed in this brief, except Section 41-1726, and as to that statute it refused to give consideration to the qualifying clause, "*said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land.*"

On that point the decision is directly contrary to that of the Idaho Supreme Court in Continental & Commercial Trust & Savings Bank vs. Werner, 36 Ida. 602, 215 Pac. 458, wherein that Court laid special emphasis on the clause which was disregarded in the Portneuf-Marsh decision. The Idaho Court expressly

held that under C.S., Sec. 3019 (now Sec. 41-1726), *"the only liens to which the lien of a Carey Act contract is superior are those created or attempted to be created by the owner and possessor of the land,"* and that is the construction that has been placed upon the statute with the sole exception of the decision of this Court and the Supreme Court of the United States in the Portneuf-Marsh case.

We need not cite authority to the proposition that the construction of a local statute by the State Supreme Court is binding on the Federal Courts; and this Court, as did the Supreme Court, has expressly held that the Carey Act lien statute on which appellee relies *is a local statute.* (Equitable Trust Co. vs. Cassia County, 5 Fed. [2d] 955).

Referring again to the records in the Portneuf-Marsh case and in the case at bar, we note the further distinctions:

(a) In the Portneuf-Marsh case the contest was between the trustees, who had a first mortgage or trust deed on the irrigation system, water rights and water contracts, on the one hand, and the operating company on the other hand, while in the case at bar it is between the construction company and the operating company, without any mortgage or lien upon the system.

(b) The assessments involved in the Portneuf-Marsh case were assessments levied under the general business corporation statute by the operating company upon *its own stock,* which was simply evidence of a water right in a irrigation system *on which the trustees held a first and prior lien.*

(c) The decision of the Court was in substance to the effect that the attempted sale of the *stock* under the assessments levied thereon did not withdraw or release the water rights and interest of the landowner in the irrigation system from the lien of the mortgage or trust deed, but the sale of the stock was subject to such lien.

(d) Both this Court and the Supreme Court in the Portneuf-Marsh case called attention to the *by-laws* of the operating company and *to a contract between the two companies,* in substance to the effect that all shares of stock should be held subject to the rights of the construction company until the amount due such company, its successors or assigns, had been fully paid.

On page 898, 5 Fed. (2d), this Court quotes from the by-laws of the operating company as follows:

> "All shares of this corporation shall be held subject to the rights of the Portneuf-Marsh Valley Irrigation Company, Limited, until the amount due to such company, its successors or assigns, shall have been fully and finally paid, as provided in the contract between said corporation and the purchasers of shares, and as provided in the contract between the said Portneuf-Marsh Valley Irrigation Company, Limited, and the state of Idaho."

The Supreme Court of the United States, p. 639 of the official report, p. 1270, 71 L. Ed., says that the *contract between the two companies* was to the same effect.

There is no such contract between appellee and appellant and there are no such provisions in the by-

laws of appellant. In the Portneuf-Marsh case the Supreme Court said that Chapter 19, Title 41, although not involved in that case, apparently meant that the assessments therein authorized would be subject and subordinate to other liens in addition to the lien for taxes. But the Supreme Court of Idaho has held otherwise. See Federal Land Bank of Spokane vs. Bissonnette, 51 Ida. 219, 4 Pac. (2d) 364, and Sanderson vs. Salmon River Canal Co., Ltd., 45 Ida. 244, 263 Pac. 32.

The Supreme Court of the United States said that Sec. 5631 of the Compiled Statutes (now Sec. 41-806, I.C.A.) was not applicable to the case. That was clearly true in view of the fact that the assessments were only on the stock and not on the water rights and land. But the Supreme Court of Idaho has expressly held that the section referred to *does apply to an operating company like appellant and that assessments may be levied under that section.*

See Adams vs. Twin Falls-Oakley Land & Water Co., 29 Ida. 357, 161 Pac. 322.

Blaine County Canal Co. vs. Hansen, 39 Ida. 649, 292 Pac. 240.

Appellee proved in the case at bar that the mortgage was released and the bonds cancelled, and stock in appellee issued in payment of the bonds (R. 204). If any of the original bondholders are still stockholders of appellee, their position is no different than that of the other stockholders and appellee has no advantage in law because some of its stockholders may at one time have held bonds which then were secured by a mortgage on appellant's irrigation system.

WHEREFORE, We respectfully submit that the decree and findings of the Trial Court be vacated and set aside and the cause remanded with instructions to dismiss the case, or with other appropriate directions in harmony with the views of this Honorable Court.

WAYNE A. BARCLAY,
Residence: Jerome, Idaho;

FRANK L. STEPHAN,
J. H. BLANDFORD,
Residence: Twin Falls, Idaho;

RICHARDS & HAGA,
Residence: Boise, Idaho,
Attorneys for Appellant.

APPENDIX

Statutes of Idaho deemed pertinent to the issues involved (Sections are of Idaho Code Annotated, 1932):

PLACE OF TRIAL OF ACTIONS

5-401. Actions Relating to Real Property.—Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial, as provided in this code:

1. For the recovery of real property, or of an estate of interest therein, or for the determination in any form of such right or interest and for injuries to real property.
2. For the partition of real property.
3. For the foreclosure of a mortgage of real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.

FORECLOSURE OF MORTGAGES AND OTHER LIENS

9-101. Proceedings in Foreclosure—Effect of Foreclosure on Holder of Unrecorded Lien.—There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the incumbered property (or so much thereof as may be necessary) and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to the plaintiff; and sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in the case of sales under execution; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued.

No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.

GENERAL STATUTE ON DISTRIBUTION OF WATER TO CONSUMERS

41-806. Amount and Lien of Rental or Maintenance.—The amount to be paid by said party or parties for the delivery of said water, which amount may be fixed by contract, or may be as provided by law, is a first lien upon the land for the irrigation of which said water is furnished and delivered. But if the title to said tract of land is in the United States or the state of Idaho, then the said amount shall be a first lien upon any crop or crops which may be raised upon said tract of land, which said lien shall be recorded and collected as provided by law for other liens in this state. And any mortgage or other lien upon such tracts of land that may hereafter be given shall in all cases be subject to the lien for price of water as provided in this section.

(Laws 1895, p. 180, effective March 17, 1895; C.S. 5631.)

CHAP. 17, TITLE 41—RECLAMATION OF CAREY ACT LANDS

41-1725. Appurtenancy of Water Right.—The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the state.

(Laws 1895, page 227, effective May 8, 1895; C.S. 3018.)

41-1726. Lien for Purchase-Price of Water Right.—Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired.

(Laws 1895, pages 227-228, effective May 8, 1895; C.S. 3019.)

41-1727. Record of Water Contract.—The contract for the water right upon which the aforesaid lien is founded shall be recorded in the office of the recorder of the county where said land is situate.

(Laws 1895, p. 228, effective May 8, 1895; C.S. 3020.)

41-1728. Foreclosure of Lien.—Upon default of any of the deferred payments secured by any lien under the provisions of this chapter, the person, company or persons, association or incorporated company, holding or owning said lien, may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right.

(Laws 1895, p. 228, effective May 8, 1895; C.S. 3021.)

CHAP. 19, TITLE 41—OPERATING COMPANIES—LIEN FOR MAINTENANCE CHARGES

41-1901. Maintenance Charges—Right to Collect—Basis of Assessment—Lien.—Any corporation heretofore organized or any corporation that shall hereafter be organized for the operation, control or management of an irrigation project or canal system, or for the purpose of furnishing water to its shareholders, and not for profit or hire, the control of which is actually vested in those entitled to the use of the water from such irrigation works for the irrigation of the lands to which the water from such irrigation works is appurtenant, shall have the right to levy and collect from the holders or owners of all land to which the water and water rights belonging to or diverted by said irrigation works are dedicated or appurtenant regardless of whether water is used by such owner or holder, or on or for his land; and also from the holders or owners of all other land who have contracted with such company, corporation or association of persons to furnish water on such lands, regardless of whether such water is used or not from said irrigation works, reasonable tolls, assessments and charges for the purpose of maintaining and operating such irrigation works and conducting the business of such company, corporation or association and meeting the obligations thereof, which tolls, assessments and charges shall be equally and ratably levied and may be based upon the number of shares or water rights held or owned by the owner of such land as appurtenant thereto or may be based upon the amount of water used; and such company, corporation or association of persons shall have a first and prior lien, except as to the lien of taxes, upon the land to which such water and water rights are appurtenant, or upon which it is used, said lien to be perfected, maintained and foreclosed in the manner set forth in this chapter; provided, that any right to levy and collect tolls, assessments and charges by any person, company of persons, association or corporation, or the right to a lien for the same, which does or may hereafter otherwise exist, is not impaired by this chapter.

(Laws 1913, Ch. 120, Am. 1919, Ch. 115; C.S. 3040.)

41-1902. Statement to Be Filed with County Recorder.—Any company, corporation or association claiming the benefits of this chapter shall, on or before the first day of April of each year, file for record with the county recorder of the county or counties in which the land lies to be affected, a statement in writing containing the name of such company, corporation or association, the general or common name of such canal system and irrigation works, or a general description of the same sufficient for identification, the amount of such charge for sudh year, and the date or dates when payable.

(Laws 1913, Ch. 120; C.S. 3041.)

41-1903. Filing of Claim of Lien.—On or after the first day of November and prior to the first day of January thereafter, the company, corporation or association, claiming the benefit of the lien herein provided, as against any parcel of land upon which the tolls, assessments and charges shall not have been paid, shall file for record with the county recorder for the county in which such land is situated, a statement containing the name of such company, corporation or association, the general or common name of the canal systems or irrigation works, or a general description of the same sufficient for identification, a statement of the lien claimant's demand, after deducting all just credits and offsets, a description of the particular tracts or parcels of land to be charged with the lien sufficient for identification, with the name of the owner or reputed owner, if known, of each particular tract or parcel, which claim must be verified by the oath of the claimant or its attorney or agent, to the effect that affiant believes the same to be just: provided, that the claim or claims for liens against all land upon which the same is claimed for one year, may be made in one or more instruments, regardless of the number of owners, reputed owners or proprietors.
(Laws 1913, Ch. 120; C.S. 3042.)

41-1904. Duties of County Recorder.—The county recorder must record the statements mentioned in this chapter in a book kept by him for that purpose, and such record must be indexed, as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds or other instruments.
(Laws 1913, Ch. 120; C.S. 3043.)

41-1905. Limitation of Lien.—No lien provided for in this chapter binds any land for a longer period than two years after the filing of the statement mentioned in section 41-1903, unless proceedings be commenced in a proper court within that time to enforce such lien.
(Laws 1913, Ch. 120; C.S. 3044.)

41-1906. Foreclosure Proceedings Relate Only to Water or Water Rights.—In the event that the owner or holder or occupant of the premises upon which water has been purchased or contracted for, has not, at the time of the filing of the claim of lien provided for in section 41-1903, received title to the premises so occupied or held by him, and liens are filed as provided for in this chapter, the proceedings for foreclosure herein provided for shall relate only to the said water or water rights and the said water or water rights shall be sold in like manner as if title to the premises had been acquired by the holder or occupant of said land, or the owner or holder of the said water right or water appurtenant to said land."
(Laws 1919, Ch. 120; C.S. 3044.)

41-1907. Foreclosure of Lien.—Proceedings in the way of civil action in the district courts may be commenced and maintained to enforce the lien herein provided, which proceedings may embrace one or more parcels of land, or one or more landowners, or reputed landowners; and except as otherwise provided herein, the provisions of the Idaho laws relating to civil actions, new trials and appeals, are applicable to and constitute the rules of practice in proceedings under this chapter; and except as otherwise provided, the nature and effect of a judgment of foreclosure shall be the same as the foreclosure of a first real estate mortgage; provided, that the sale of such land under foreclosure shall pass to the purchaser, all ditch and water rights appurtenant thereto, and the interests, including corporate stock, of the owner or holder of such land in such corporation, company or association.
(Laws 1913, Ch. 120: C.S. 3046.)

41-1908. Interest on Delinquent Assessments.—All charges levied under the provisions of this chapter shall draw interest at twelve per cent per annum from the time when due and payable, to the entry of judgment of foreclosure, and the right of lien shall extend to such interest and the costs of foreclosure.
(Laws 1913, Ch. 120; C.S. 3047.)

41-1909. Release of Lien.—It shall be the duty of the company, corporation or association of persons filing a lien statement as provided in section 41-1903, to cause a release of the same upon the records of the county where filed, in the same manner and with like penalties for failure as is or may be provided by law in case of real estate mortgages.
(Laws 1913, Ch. 120; C.S. 3048.)

41-1910. Interpretation.—This chapter shall not be held to affect the rights of any person, corporation, company or association of persons to charge or collect tolls, charges or assessments to which it may be otherwise entitled; nor the right of a corporation to make assessments upon its stock according to law; nor the obligation of a stockholder or member of any corporation or association otherwise created; nor any other lien or right of lien given by the laws of this state, or otherwise.
(Laws 1913, Ch. 120; C.S. 3049.)

No. 9049

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTH SIDE CANAL COMPANY, Limited, a Corporation, *Appellant*,

vs.

IDAHO FARMS COMPANY, a Corporation, *Appellee*.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division

EDWIN SNOW,
Residence: Boise, Idaho;

A. F. JAMES,
Residence: Gooding, Idaho,
Attorneys for Appellee, Idaho Farms Company.

FILED

MAR 27 1939

PAUL P. O'BRIEN,

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SUBJECT INDEX

IV.

GENERAL COMMENTS ON APPELLANT'S BRIEF

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TEXTBOOKS AND ENCYCLOPEDIAS

STATUTES

United States

Circuit Court of Appeals

For the Ninth Circuit

NORTH SIDE CANAL COMPANY, Limited
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vs.

IDAHO FARMS COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE

(A)—Plan of Carey Act Reclamation.

This suit involves primarily the relative priority of a claim on the part of the bondholders of a Carey Act construction company to be reimbursed for the cost of constructing an irrigation system as against the subsequent claim of a Carey Act operating company for the cost and expense of operating and maintaining the irrigation works so constructed.

In order that the court may have before it the essential features of the "Carey Act" plan or method whereby the arid lands involved in this project were authorizd to be reclaimed, water rights therein sold to settlers, and whereby the parties accomplishing the reclamation of the land should be reimbursed for the construction costs, a brief outline is here pre-

sented of the salient provisions of the federal and state statutes primarily involved, together also with the pertinent provisions of the contracts under which his particular project was built and is being operated.

The original "Carey Act" of Congress, being Section 4 of the Act of August 18, 1894, (now Section 641, et seq., Title 43, U. S. C. A.), provides that the United States would donate without cost to each of the states containing desert lands a large area of such lands, conditioned upon the state causing the lands to be irrigated, reclaimed, occupied, and cultivated by actual settlers. By a subsequent amendment (Act approved June 11, 1896—now Section 642, Title 43, U. S. C. A.), the following provision was added to the original Carey Act:

> "A lien or liens is hereby authorized to be created by the state to which such lands are granted, and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers".

By appropriate legislation enacted in the year 1895 (now embodied in Chapter 17, Title 41, Idaho Code Annotated—Sections 41-1701 to Section 41-1740, inclusive) the state of Idaho accepted the benefits of the congressional Carey Act and set up the

machinery thereunder for the reclamation of desert lands in Idaho.

The Twin Falls North Side irrigation project which is here in controversy was initiated by the execution of three contracts between appellee herein (whose corporate name was then Twin Falls North Side Land & Water Company) and the State of Idaho (Exhibits 1, 2, and 3). While each contract related to a separate area or "segregation" of the project, the three contracts were similar in all essential respects and by their terms were to be construed together.

By these contracts the appellee bound itself to build the irrigation works as described therein and to sell water rights therein to settlers who might enter or file upon the segregated lands. The price and terms per share at which the water rights should be sold to settlers were specified in the state contracts. Initially, of course, since the entire irrigation system was to be created by the construction company, it naturally belonged to such builder. But its proprietorship was qualified and limited. It owned it in a trustee capacity for the purpose of selling shares or water rights therein to actual settlers to whom upon completion the entire system and the water rights connected therewith were to be conveyed.

To accomplish this declared purpose, the state contracts provided for the organization of an operating company to which upon completion the whole property should be transferred. That operating

company is the appellant in this suit. Initially the entire capital stock of the operating company—authorized at 200,000 shares—was to be issued to and belong to the construction company as consideration for the building of the system (R. 185). But this was only in order to enable it to deliver to purchasers of water rights the shares of stock in the operating company which represented such water rights; thus the state contracts set forth, that

> "said shares of stock, however, shall have no voting power and shall not have force and effect until they have been sold or contracted to be sold to purchasers of land under this irrigation system.
>
> "At the time of the purchase of any water right there shall be issued to the purchaser thereof one share of the capital stock of said corporation for each acre of land entered or filed upon" (Par. 9, state contracts, R. 185).

As a part of the plan for the construction of the project, the sale of water rights therein and the subesquent operation of the system and the delivery of water for irrigation thereform, it was also provided in the state contracts (Par. 9, R. 184) that one of the functions of the operating company should be that of "operating and maintaining said canal during the period of construction and afterwards" and "the levying and collecting of tolls, charges, and assessments for the carrying on and maintenance of said canal and the management ad operation thereof."

But in accordance with the above quoted provision of the state contract to the effect that the shares of stock of the operating company "shall not have force and effect" until sold, and to elucidate the clear meaning and intent of such provision, Section 5 of Article 10 of the by-laws of the appellant operating company (Ex.8, R. 191) provides, and has always provided, as follows:

> "Section 5. All the stock of this Corporation shall be issued to and held by the Twin Falls North Side Land and Water Company, its successors or assigns, in order to enable it to deliver shares of stock to purchasers of water rights, but said shares of stock shall have no voting power and shall not have force and effect and shall not be assessable for any purpose either for maintenance or otherwise, until they have been sold or contracted to be sold to entrymen or owners of land under the irrigation system, and all assessments, maintenance and other charges must be paid by the purchaser or owner of the stock *and not by the Twin Falls North Side Land and Water Company, its successors or assigns*". (Emphasis supplied).

(B)—Brief History of the Carey Act Project Here Involved.

The project here involved was initiated in 1907. In that year two of the "state contracts" (Exs. 1 and 2) were made. Later, in 1909, the state contract (Ex. 3) covering the third segregation was executed. On November 1, 1907, a trust deed or mortgage (Ex.

9) upon the entire project and its water appropriations was executed by the construction company to certain trustees and bonds secured thereby issued by the construction company in the amount of $5,000,000.00; extensive construction work was thereupon inaugurated.

In 1913, the construction company became insolvent. There were then outstanding $3,770,000.00 of bonds. Soon thereafter a bondholders' committee was appointed. In lieu of foreclosure of the trust deed, there was turned over to this committee a majority of the capital stock of the construction company and all the capital stock of its wholly owned subsidiary, the investment company. The bondholders thus took over the completion of the system. Between 1913 and 1920 the construction work on the irrigation project was completed at an expenditure by the bondholders of upwards of $2,000,000.00 additional money. On August 6, 1920, the project was completed and accepted by the state (Ex. 10, R. 197). Shortly thereafter the project (subject to the trust deed) was conveyed in its entirety to the appellant operating company and has since been owned and operated by it.

In December, 1936, the steps were completed whereby in lieu of foreclosure of the trust deed the bondholders obtained legal title to all the assets mortgaged and pledged under the trust deed; all the balance of the capital stock of the construction company was then surrendered for the benefit of the bondholders. The investment company subsidiary was

merged into the construction company and ceased its corporate existence, the surviving corporation being the appellee which in connection with those proceedings changed its corporate name to Idaho Farms Company; the trust deed was released; all the capital stock of the construction company was re-issued to the bondholders, evidencing their proportionate interest in the assets previously mortgaged and pledged to the trustees for their benefit.

(C)—The Main Question for Decision Herein.

The main question presented for decision herein arises out of the following essential facts:

The appellee construction company during the course of the construction of the system and since has sold to settlers 170,000 shares of water rights in the system. While initially planned to irrigate 200,000 acres of land, the project involved has by agreement of all interested parties, confirmed by various court decrees, been reduced to 170,000 acres. Of the sales of water rights so made, a very great proportion have "stayed sold"; that is to say, the settlers have paid all installments of principal and interest falling due on their water purchase contracts, and have also paid the assessments for maintenance and operation levied annually by the operating company. Hence, with respect to these no controversy between the constructon company and the operating company has ever been presented. However, in the case of certain shares and the lands to which they are appurtenant, the settlers to whom such shares were sold having made default on the purchase contracts, it has

been necessary for the bondholders of the construction company to repossess the same, either by foreclosure proceedings upon the settlers' contracts or by quitclaim deeds taken in lieu of foreclosure. This property the appellee claims to hold—until resale to other settlers—exempt from assessment and in the same status and under the same conditions as if it had never been sold at all, inasmuch as the previously attempted sales have failed and come to naught; the land is not farmed or irrigated; it is awaiting re-sale to other settlers.

The appellant operating company, on the other hand, claims that by appropriate proceedings for imposing maintenance assessments during the years 1935 to 1937, inclusive, it has valid liens upon this property which are prior and paramount to any lien or claim of the construction company or its bondholders for the construction costs.

The appellee construction company (the stockholders of which in the present instance are the bondholders who actually furnished the funds which created the project) on its part asserts that the cost of reclaiming the lands involved in this suit represents under the applicable state and federal statutes a paramount lien or charge thereon; and that this paramount claim cannot be erased and wiped out through the mechanism of imposing maintenance liens upon this dormant property while awaiting resale to other settlers.

(D)—Collateral Questions.

In addition to the above basic question herein pre-

sented for decision, there are certain collateral issues which defendant interposed in its answer to plaintiff's complaint. A plea in abatement is urged based upon the alleged fact that there were pending in the state court at the time this suit was instituted certain foreclosure actions instituted by appellant for the enforcement of maintenance liens than those involved in this suit. This suit involved the liens for the years 1935-1937 inclusive. The state court suits are alleged to involve liens for the years 1932 to 1934 inclusive. Appellant also pleaded in its answer and sought to establish an *equitable lien* (R. 52) upon the property here involved, based upon allegations asserting that it had expended considerable sums of money in the repair and improvement of the irrigation works and the acquisition by purchase and lease of additional water rights; and that in equity appellee should be required to pay its ratable proportion of such expense, irrespective of the validity or priority of appellant's statutory liens; appellant further asserted (fifth affirmative defense, R. 54) that appellee by its acts and conduct is estopped from asserting in this suit the priority of its construction lien; also that the water rights appurtenant to appellee's lands had been abandoned because of the fact that no water has been used for the irrigation thereof (R. 59). The trial court held against appellant on each of these collateral defenses and appellant assigns error with respect to each. It is moreover claimed that the court erred in rejecting certain documentary evidence offered by appellant in support

of its contentions.

The precise basis of law and fact thought by appellant to support its own and the trial court's position in the various matters here in controversy are set out hereinafter under separate headings. It would seem needless repetition to present them in detail in this statement of the case.

It has not been felt practicable to pursue in the following discussion precisely the same order of argument as adopted in appellant's brief.

SUMMARY AND ARGUMENT

I

The Trial Court Properly Denied the Plea in Abatement.

(1) The United States Supreme Court is the only court of last resort which has passed precisely upon practically all the questions here presented. These questions involve both federal and state statutes and certain aspects of the case as here presented also involve the federal constitution.

> Portneuf Marsh-Valley Irrigation Company v. Brown, 299 Fed. 338; reversed by this court 5 Fed. (2d) 895; reversal upheld 274 U. S., 630; 71 L. Ed., 1243

(2) Appellant's contention, in these circumstances, that the federal courts should postpone consideration of this case awaiting some possible future pronouncement of the state courts upon similar legal questions would, if sustained, paralyze the functions of federal courts within the jurisdiction expressly conferred by Congress; such course would not be

comity but apathy and surrender.

Concordia Insurance Co. v. School District, 282 U. S., 575; 75 L. Ed., 528;

Reese v. Peck, 18 Howard, 595; 15 L. Ed., 518;

Burgess v. Seligman, 107 U. S., 20; 27 L. Ed., 359;

Southern California Edison Co. v. Hopkins, (C. C. A. 9th), 13 Fed. (2), 814, 820.

(3) Appellant claims that when this suit was brought there were pending in the state courts certain foreclosure suits brought by it involving other and different annual maintenance liens of appellant than those here involved; that therefore this suit should have been abated. The records in these state court suits were not introduced in evidence. There is nothing here to contradict the findings of the court below (R. 104) that the cause of action and issues in this suit are wholly different from those involved in the state court suits.

(4) The state court itself, by denial of appellant's application for injunction against the prosecution of this suit, reached the same conclusion (R. 50) as the federal court below.

(5) The authorities cited in appellant's brief in support of its plea in abatement are all cases where the property involved in the previous suit was in the actual or potential custody and control of the court entertaining the previous suit and where the control was essential to the jurisdiction invoked. Nothing

approaching that situation is even claimed to exist here.

(6) Even accepting appellant's statement that its prior pending suits in the state courts involved the foreclosure of the same kind of maintenance liens (but admittedly wholly different liens and for different years) as the maintenance liens here involved, such fact was no ground for abatement of this suit. No possible conflict of jurisdiction is involved.

United States v. Klein, 303 U. S. 279, 281; 82 L. Ed., 840;

Boynton v. Moffatt Tunnel Improvement District, 57 Fed. (2d), 772 (C. C. A. 10th);

Ingram v. Jones (C. C. A. 10th), 47 Fed. (2d), 135;

Morrow v. Superior Court (Calif.), 48 Pac. (2d), 188;

Watson v. Jones, 13 Wallace, 679; 20 L. Ed., 666;

Detroit Trust Company v. Manilow (Mich.), 261 N. W., 303;

National, etc. Works v. Oconto City Water Supply Co. (Wis.), 81 N. W., 125;

Franzen v. Chicago, etc. Ry (C. C. A. 7th), 278 Fed., 370;

American Seeding Machine Co. v. Dowagiac Co., 241 Fed., 875;

Frink Co. v. Erickson, 20 Fed. (2d), 707;

Royster Guano Co. v. Stedham (Ga.), 172 S. E., 555;

Lewis v. Schrader, 287 Fed., 893;
Equitable Trust Company v. Pollitz, (C. C. A. 2d), 207 Fed., 74.

(7) Under the pealdings in this case (R. 20), the federal court below had ample authority under the law of Idaho governing suits for quieting title to determine the relative priority of the liens or claims of the respective parties to the property here involved.

Section 9-401, I. C. A.
Coleman v. Jaggers, 12 Ida., 125; 85 Pac., 894;
Blackman v. Pettengill, 30 Ida., 241; 164 Pac., 358;
Hanley v. Beatty (C. C. A. 9th), 117 Fed., 59.

II

Appellee's Claim to the Property Involved Is Prior and Paramount to the Maintenance Liens of Appellant.

(1) It was so decided by this court and the United States Supreme Court in the Portneuf case, supra.

(2) The status of the respective parties in the Portneuf case and in this case are identical, as shown by the opinions and especially by comparison of the records in the two cases.

(3) The status of the property involved is identical in the two suits, as similarly shown.

(4) The same identical questions were presented for decision in the two cases:

(a) *Merger.*

While the *trial court* in the Portneuf case con-

cluded that the foreclosure of the settlers' water contracts extinguished the previous lien for construction costs, that doctrine was rejected upon appeal.

No merger of the lien in the title will be held to occur against the manifest interest of the lienholder.

Factors & Traders Insurance Company v. Murphy, et al, 111 U. S., 738; 28 L. Ed., 582;
Wilson v. Linder, 21 Ida., 576; 123 Pac., 478;
Jones on Mortgages, 8th Edition, Section 1080;
41 C. J., Section 874.

By the terms of the governing state contracts, appellee's property was initially exempt from assessment. It was obliged to make sales of water rights and was also compelled to foreclose against the settler or have its claim barred by the statute of limitations.

Meridian v. Milner, 47 Ida., 439; 276 Pac., 313.

In these circumstances, the temporary settler or contract-holder was a mere shadow, the beneficial interest sold to him remaining always in the construction company.

Bennett v. Twin Falls, etc. Co., 27 Ida., 643, 652.

The settler's water contract created as against him what is analogous to a purchase money mortgage, the interest of the settler merely passing through his hands and, without stopping, resting again in the construction company.

Keith v. Cropper, 196 Iowa, 1179;
41 C. J., 528, Sec. 470;
Section 61-405, I. C. A.;
Nelson v. Parker, 19 Ida., 727; 115 Pac., 488;
Clark v. Paddock, 24 Ida., 142; 132 Pac., 795;
Bennett v. Twin Falls, etc. Co., 27 Ida., 643, 652; 150 Pac., 336;
Kneen v. Halin, 6 Ida., 621; 59 Pac., 14.

(b) Any distinction between the form of assessments in the Portneuf case, and here is wholly to appellant's disadvantage.

In the Portneuf case, the Supreme Court of the United States expressly declared that by the terms of Section 41-1910, I. C. A., the liens here claimed by appellant under Section 41-1901 was "in terms" made subject to the Carey Act construction lien.

71 L. Ed., at page 1270.

(c) The statutory lien for construction costs attached by operation of law upon compliance with the terms of the law. Section 41-1726, I. C. A., provides that "any * * * company * * * furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water

right". The Supreme Court of Idaho has declared that the construction lien attaches when water has been made available for the land.

> Columbia Trust Co. v. Eikelberger, 42 Ida., 90; 245 Pac., 78.

(d) Just as in the Portneuf case, appellee's rights are grounded upon a trust deed or mortgage upon the entire irrigation system, executed even prior to its construction. This general lien represented construction costs. Any rights that appellant has to levy maintenance assessments is subject to it.

(e) Appellant relies on the case of Bank v. Werner, 36 Ida., 602; 215 Pac., 458. The case is not in point. It merely decided that the lien of the sovereign for taxes (under statutes even antedating the Carey Act construction lien law) were paramount to a Carey Act construction lien. The Werner case is wholly inapplicable to the question of the relative priority of liens asserted by private parties.

Mere dicta, not relevant to the decision of the actual controversy before the court, is not binding either upon the court that uttered it or upon other courts.

> Bashore v. Adolph, 41 Ida., 84; 238 Pac., 534;
> Stark v. McLaughlin, 45 Ida., 112; 261 Pac., 244;
> Eldridge v. Black Canyon Irrigation District, 55 Ida., 443; 43 Pac., (2d), 1052;
> Carroll v. Carroll, 16 How., 275; 14 L. Ed., 936;

Matz v. Chicago, etc., A. R. Co. (C. C. A. 8th), 85 Fed., 180;

Leeper v. Lamson G. Neely Co., 293 Fed., 967.

The same principle applies to the case of Carlson-Lusk v. Kammann, 39 Ida., 634; 229 Pac., 85, and other cases cited by appellant with respect to the alleged priority of maintenance liens declared by Section 41-1901, I. C. A. The Idaho Supreme Court in the Carlson-Lusk case merely announced that that section of the statute was inapplicable to the controversy then before it. It had no occasion to even mention, and did not mention, Section 41-1910, I. C. A., which is a part of the same chapter of the state code and which section has been constructed by the Supreme Court of the United States in the Portneuf case as "in terms" giving appellee's construction lien priority over liens of appellant asserted under Section 41-1901.

In another suit between the parties here, Judge Guy Stevens of the Idaho District Court in a very recent opinion (printed in full as an appendix to this brief) considers all the state court cases relied on by appellant as having no bearing on the questions with respect to which they are cited by appellant in its brief here.

(f) If the language of Section 41-1901 were construed as displacing appellee's prior construction lien, wholly contrary to the interpretation put upon

that statute in the Portneuf case by the Supreme Court of the United States, the section would then be invalid because contrary to the federal Carey Act and also contrary to those sections of both the federal and state constitutions which inhibit sale legislation impairing the obligation of a contract.

37 C. J., page 329, Sec. 41;
17 R. C. L., page 611, Sec. 21;
Toledo, etc. v. Hamilton, 134 U. S., 269;
12 Am. Jur., page 354, Sec. 671, Title "Constitutional Law";
Yeatman v. King, 51 N. W., 721;
National Bank of Commerce v. Jones (Okla.), 91 Pac., 191;
Baker v. Tulsa Building & Loan Assn. (Okla.), 66 Pac. (2d), at page 49;
Barnitz v. Beverly, 163 U. S., 118; 41 L. Ed., 93.

The federal Carey Act in saying that the construction lien "*when created shall be valid*" asserted the ordinary meaning of "validity"; that is, incapable of being rightfully overthrown or set aside by subsequent legislation.

King v. Fraser, 23 S. C., at page 567;
Emerson v. Knapp, 75 Mo. Appeals, 92, 97;
U. S. v. McCutcheon, 234 U. S., 702;
Edwards v. O'Neal (Tex.), 28 S. W. (2), 569, 572.

III
COLLATERAL ISSUES

(1)—Appellee Is Not Estopped From Contesting the Validity of Appellant's Assessments.

There is no testimony in the record that appellant would have acted any differently than it did in any respect regarding its maintenance assessments here involved (1935-1937 incl.) or with respect to making any expenditures out of moneys collected from such assessments in reliance on any act or conduct of appellee (R. 108.) This indispensable element of estoppel is wholly lacking. Where both parties have equal knowledge of the matters relied upon as constituting estoppel, estoppel cannot be invoked.

Cahoon v. Seger, 31 Ida., 101; 168 Pac., 441;
Sullivan v. Mabey, 45 Ida., 595; 264 Pac., 233;
Johansen v. Looney, 31 Ida., 754; 176 Pac., 303;
National Surety Co. v. Craig, 220 Pac., 943;
Midwest Lumber Co. v. Brinkmeyer, 264 Pac., 17, 19;
Brant v. Virginia Coal & Iron Co., 93 U. S., 326; 23 L. Ed., 927.

All the acts of Mr. R. E. Shepherd relied upon by appellant as constituting estoppel were performed while Mr. Shepherd was general manager of appellant company. In these circumstances, though Mr. Shepherd was also manager of appellee, neither cor-

poration will be held to have waived any right by reason of any act of his.

Vol. 14-A Corpus Juris, 365.

The fact that appellee paid certain assessments on its property up to and including the year 1931 constitutes no waiver of its rights to contest the assessments here. Appellant well knew when the assessments here involved were levied and expenditures therefrom made that appellee for from three to five years prior had been refusing to pay any assessments upon its property.

"The essence of waiver is estoppel, and when there is no estoppel there is no waiver".

67 C. J., page 294;

Globe Mutual Life Ins. Co. v. Wolff, 95 U. S., 326; 24 L. Ed., 387, at page 389;

Williams v. Neeley (C. C. A. 8th), 134 Fed., 1;

Hawkins v. Smith, 35 Ida., 349; 205 Pac. 188.

Payment of illegal assessments cannot estop the person paying them from refusing to continue to pay the illegal exactions.

Gibson v. Iowa Legion of Honor, 159 N. W., 639;

O'Malley v. Wagner (Ky.), 76 S. W., 356;

Juett v. Cincinnati Railroad Co. (Ky), 53 S. W. (2d), 551;

Williams v. Harrison (Ind.), 123 N. E., 245;

Quaschneck v. Blodgett, 156 N. W. 216.

"A waiver, like a gift, can only operate in praesenti".

Gardner v. Clark, 21 N. Y., 399;

Johnson v. Nevada Packard Mines Co., 272 Fed., 291, at page 305;

Walsh v. Howard & Childs, 113 N. Y. Supp., 499, 502;

Rice v. Fidelity & Deposit Co. (C. C. A. 8th), 103 Fed., 427, 435.

Any alleged acts of acquiescense to be effective as an estoppel must be such as to mislead a party who is entitled to rely thereon and who has changed his position to his disadvantage by reason thereof.

21 C. J., Section 222, page 1217.

(2)—The Trial Court Properly Rejected Exhibits 33 and 34 and Like Testimony.

After this suit was begun by appellee to determine the validity and relative priority of the maintenance liens of appellant for the years 1935 to 1937 as against appellee's liens for construction costs, and after appellant had appeared herein, it brought several suits in the state court to foreclose the *identical maintenance liens* involved in this suit.

One of the statutes under which appellant claims its liens (Section 41-1905, I. C. A.) provides that a canal company, in order to preserve its maintenance liens, must within two years begin suit to enforce them "*in a proper court*".

At the trial of this suit, appellant sought to prove the preservation of its 1935 and 1936 maintenance liens by evidence of having (wrongfully, we think) brought the foreclosure suits in the state courts under the circumstances above recited. Appellee's objection to this evidence was sustained (Exhibits 33 and 34; R. 219) on the ground that such attempt by appellant to thus create a head-on collision between the jurisdiction of the different courts with respect to the same identical cause of action and the identical maintenance liens here involved should not be treated as a compliance with the statute above cited, which required the bringing of the suits for foreclosure "in a proper court". We think the term "a proper court" as used in the statute means a court having at the time the suit is filed jurisdiction to foreclose the lien. This jurisdiction the state court did not have at the time appellant's foreclosure suits were filed because the federal court by this suit had at the time exclusive jurisdiction to deal with those identical liens.

Admittedly, the bringing of the later suits in the state court could have been prevented by injunction. If so, they could not be said to have been brought in the proper court. Two courts could not have at the same time jurisdiction to determine the validity of identical liens on the identical property: A conflict of process inevitably must result.

In the case of Covell v. Heyman, 111 U. S., 176; 28 L. Ed., 390, 393, the United States Supreme Court said:

> "* * * when one (court) takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty".

The trial court's rulings primarily involved the construction of Section 41-1905, I. C. A. Appellant's lien for the year 1935 had admittedly lapsed unless preserved by the state court suits. This is not so as to the 1936 and 1937 liens which had not lost their status by limitation of time.

(3)—Appellee's Alleged Claim of "Offset" to Appellant's Statutory Assessments.

In specifications of error Nos. 8 and 15 and in appellant's discussion of them on page 82 of its brief, it is stated that appellee claims an "offset" against appellant's statutory assessments here involved, by reason of the fact that water was not used on appellee's property during the years here in question; also that the trial court erroneously admitted evidence (R. 256, 257) in support of such claim; and found as a fact (R. 105, 106) relevant to such claims and "on the same theory" that appellee's water rights had not been used on its lands, but had instead been used by appellant on the lands of its other stockholders.

No such claim of "offset" was or is made by appellee nor was the trial court's said finding or its admission of such evidence based upon any such theory. Certainly there is no authority in law for

any such alleged "offset" to appellant's *statutory assessments.*

The court's finding of fact and its ruling on the said evidence was on a wholly different theory and for wholly different reasons. It was because appellant pleaded in its third affirmative defense (R. 52) an *equitable lien* upon appellee's property for expenditures made in the improvement of the irrigation system. It also pleaded (R. 58) that appellee had lost its water rights by non-user and abandonment.

Upon the issues so raised by both these defenses the evidence received by the court and of which appellant complains was highly relevant, and the finding of fact of which appellant complains was wholly pertinent to these same defenses.

Appellant both in its specification of error and in its argument on this point wholly distorts both the trial court's position and appellee's position.

(4)—Abandonment of Appellee's Water Rights.

Appellant pleaded (R. 58) as a defense that appellee's water rights had been lost through non-user and abandonment; and alleges as error (Specification No. 6) the trial court's failure to sustain the claim (R. 113). The point is discussed on page 81 of appellant's brief.

While appellee's water rights have not been used on appellee's property here involved, the water represented thereby has been continuously used by appellant itself upon the lands of its other stockholders, to their great benefit; appellant holds the legal title

to the water in a trustee capacity for all of its stockholders; it cannot assert abandonment, forfeiture, or prescriptive right against any of them. Moreover, all the stockholders of appellant company are tenants in common in the water rights of this Carey Act project, the waters having been appropriated for the benefit of the project as a whole, according to the terms of the state Carey Act contract; the use of water by one tenant in common is deemed to be use by all. The statute relied on by appellant (Section 41-216, I. C. A.) has no application here. There was no abandonment or forfeiture. Appellant makes no serious attempt to controvert the foregoing principles as announced in the trial court's opinion (R. 165, 166) nor the authorities cited by the court in support of them; a legion of other authorities might be adduced to support the principles here asserted.

IV

General Comments on Portions of Appellant's Brief.

(1) Appellant complains that the trial court's decree exempted appellee's property from assessment. The exemption granted is only a limited and qualified one. It merely permits appellee to obtain its authorized construction cost of the project out of the property before being deprived of it by intervening maintenance assessments. Appellant in its brief repeatedly urges that the relationship of the construction company and the bondholders to a Carey Act project is a trustees relationship; that it is a mere agency or instrumentality of the state and federal

government for the purpose of passing title to water rights to others in the irrigation system it has created, and which it shall do without profit. This is precisely the view adopted by the trial court; and the qualified exemption from assessment which the court decreed is strictly limited and qualified so as to permit appellee to obtain if it can only its construction costs from the property reclaimed — and without profit. Certainly the federal Carey Act should not be construed (contrary to its plain terms) to provide a method, direct or indirect, whereby the very agency selected by the state to reclaim the land, should obtain a monopoly upon the land reclaimed.

Appellant, to advance the interest of some of its stockholders, refuses to accept that doctrine.

(2) Appellant further argues that exemption from assessments is never presumed and should not rest upon implication. It does not here rest upon implication. The Supreme Court of the United States in the Portneuf case, 71 L. Ed., 1269, stated:

> "The question may be resolved without exclusive reliance upon implications to be found in the general nature and purpose of the (Carey Act) plan itself".

Comparison of the pertinent contracts and by-laws of the operating company as disclosed by the record in the Portneuf case and the same documents in this case will show that the plain meaning and intent of the governing instruments on both projects, construed in the light of the controlling federal and state

statutes, effectuate an *express* exemption from assessment to the precise extent decreed by the trial court here, but no further.

(3) Appellant further asserts that Section 41-806, Idaho Code Annotated (formerly Section 5631, Compiled Statutes) antedates even the Carey Act construction lien law, being a prior act of the same legislative session (1895) and that such statute asserts the priority of its maintenance liens. The statute is wholly inapplicable. It is conceded that water has neither been furnished or delivered to appellee's lands here. And the statute declares a lien only for water "furnished and delivered".

Moreover, a consideration of the original act of the legislature (Laws 1895, page 174), of which what is now Section 41-806 is only a part, shows plainly that the lien granted was a lien for the *purchase price* or *rental value* of water given to companies constructing irrigation projects for purposes of rental and sale, and is not at all a lien for maintenance such as appellant here asserts. If it has any bearing at all, the statute supports appellee's contention and not appellant's.

This precise section was the entire subject matter of opposing briefs requested by this court in considering whether to grant a rehearsing in the Portneuf case. To avoid useless repetition, reference to those briefs is hereby respectfully made. While perhaps *appellee* could confidently rely upon Section 41-806 alone in support of the priority of its lien, it is

thought that the Carey Act construction lien statute (Section 41-1726), being special legislation relating to a precise character of enterprise, has the more direct bearing.

Of necessity, this "Summary of Argument" omits various perhaps minor but still important matters. These are amplified in the argument which follows and to which the court is respectfully referred.

ARGUMENT

I.

(A)—The Trial Court Properly Denied the Plea in Abatement.

This suit was begun by appellee on November 24, 1937. The complaint, after setting out the pertinent history of the project and the instruments and proceedings whereby it acquired the property here involved, states that appellant has from time to time levied certain pretended assessments upon the lands and water rights listed and described; and that appellant asserts that by reason thereof it has a claim or lien upon said parcels of property, and each of them, which is prior and paramount to appellee's title and claim; but to which in fact appellant's claim is subordinate (R. 19, 20). The complaint prayed that appellant should be required to set forth the nature of its liens or claims and that the relative priority or status of the conflicting claims of the parties be determined.

The record here discloses that at the time this suit was filed appellant was claiming liens upon the property involved, based upon maintenance assess-

ments for each of the years 1931 to 1937, inclusive. These liens represented the alleged annual cost of operating and maintaining the irrigation system and delivering water therefrom.

It is alleged in appellant's answer (R. 49) that at the time this suit was commenced, twelve suits were then pending in the state district courts of Idaho for the foreclosure by appellant of certain maintenance liens for the years 1932 to 1934, inclusive.

While no proof was offered by appellant with respect to these prior suits, and hence it does not appear when they were filed, it may by conclusive inference be known that they had been pending for several years, if the liens sought to be foreclosed in those suits were similar in form and character to the liens asserted in this suit. Section 41-1905, Idaho Code Annotated, provides that to be effective such foreclosure suits upon liens of the character asserted by appellant in this suit must be filed within two years after recording the statement of the annual lien. Therefore, the suit on the 1932 assessment lien must on November 24, 1937, have been pending three years or longer if the lien sought therein to be foreclosed was similar to the liens asserted by appellant in this suit. Since the record of these alleged suits was not offered in evidence, it does not here appear what was the character of the liens asserted, what property was affected, or what precise issues were involved.

In addition, however, to such liens claimed by appellant for the years 1932 to 1934, inclusive, in-

volved in the then pending state court suits, the record herein does clearly disclose that appellant was also claiming against appellee's property maintenance liens for the years 1935, 1936, and 1937. Upon none of these liens had appellant begun foreclosure suits in any court prior to the time this suit was filed.

In these circumstances, both to avoid a great multiplicity of suits and possible conflict of decision by several courts, appellee brought this action to determine in one proceeding (in the one court having territorial jurisdiction over the entire property involved) all conflicting claims of the parties hereto upon the property involved. Thereupon, appellant made application to the District Court of Jerome County to enjoin the prosecution of this suit. That court, after hearing, made its order enjoining the prosecution of this suit, only in so far as it affected the subject matter of the prior litigation in that court; that is, certain assessment liens for the years 1932 to 1934, inclusive (Statement of appellant's counsel, R. 213). Following that order, and pursuant to stipulation between the parties, a disclaimer was filed by appellee, eliminating any controversy whatever in this suit respecting any of the 1932, 1933, and 1934 liens of appellant (R. 50; 213). So it sought in this suit to quiet its title only against the separate maintenance liens of appellant asserted for the years 1935, 1936 and 1937. The case was tried upon such stipulation and theory and the relief granted by the trial court was restricted solely to the issues so made.

The record herein also discloses that after the filing of this suit and appellant's appearance herein, appellant then commenced four additional suits in the state courts to establish and foreclose its maintenance liens for the years 1935 and 1936. No suit has been begun in any court to enforce appellant's 1937 lien.

In the situation thus presented, it is now claimed by appellant that the trial court should have abated this suit by appellee to quiet its title to the property involved because of the pendency in the state courts of those foreclosure suits relating to appellant's other alleged liens for the years 1932 to 1934, inclusive. It is thought that this contention cannot prevail for the following cogent reasons:

(1) The court below found that the subject matter of each of the suits pending in the state courts was wholly different and distinct from the subject matter of this suit and that the questions, controversies, and issues raised were not the same (R. 104). There is nothing whatever in the record to controvert this finding.

(2) The *state trial court* decided that the prosecution of this suit for quieting appellee's title as against any claims or liens asserted for the years 1935 to 1937 would in no matter conflict with its jurisdiction in the previously pending suits; because, as admitted in appellant's answer herein (R. 49), while appellant applied to the state court to enjoin the prosecution of this action, its application was

granted only in so far as it affected any liens for the years involved in the then pending state court litigation (R. 50). This should be conclusive. The Federal Court should not thrust upon the State Court a cause as to which it had expressly waived any right to claim jurisdiction.

(3) Assuming for the moment that the liens asserted for the prior years and involved in the prior state court litigation were of similar character to those asserted for the years here in controversy, the correctness of the trial court's finding herein (R. 104) to the effect that "the lien claimed by the defendant herein for maintenance and operation for each year depends for its validity (among other things) upon the timeliness, regularity, and propriety of the proceedings done and taken by defendant at wholly different times in order to effect and enforce the same," is readily apparent.

Section 41-1902, I. C. A., provides that in April of each year the company claiming the maintenance lien for that year shall file a statement of the charge, etc. and the date or dates when payable. Section 41-1903, I. C. A., provides that or after the first day of November and prior to the first day of January thereafter, the company shall file its claim of lien of specified form and content. It is thus apparent the lien for each year, even though it might involve a similar legal question, involves also wholly distinct and separate questions.

It is true that the court below found (R. 99-101) that the proceedings of appellant were regular with

respect to the levy and recording of the three annual liens of appellant involved in this suit, but it by no means follows that these matters were not controverted below. For instance, it was and is claimed by appellee that there is no evidence in the record establishing that any levy for any of these years was ever made, as no resolution of the board of directors of appellant showing such levy was presented in evidence. Moreover, it is appellee's position that if the recitals in the respective notices and claims of lien are taken as proof of the levy, nevertheless they show on their face that the assessments were not "equally and ratably levied" as required by Section 41-1901, in this: That it is shown on the face of the recorded notices (R. 63) that a credit of twenty-five cents per share was allowed by reason of the use upon other lands of the project of certain water rights appurtenant to the lands of the first segregation; while the record here conclusively shows and the court found *that without similar credit* "defendant and its stockholders (other than plaintiff) have continuously for many years used the water appurtenant to plaintiff's lands upon lands of the project belonging to such other stockholders" (R. 106).

Having taken no cross appeal, appellee is not in position to ask this court to review these matters, and we point them out merely to negative the statement found on page 39 of appellant's brief to the effect "The procedure for effecting appellant's lien is inconsequential. There is no controvery as to the date, form, or contents of the liens or statements filed by

appellant. The controversy is wholly as to their statutory effect upon appellee's lands".

(4) Since no prior litigation whatever was pending in the state courts with respect to the liens here involved, and since this a suit only to quiet title against the recorded liens for the years 1935 to 1937, inclusive, it is perfectly obvious that it was not within the scope of any prior litigation to afford appellee the relief to which it was entitled in this suit. The state court litigation had nothing to do with the liens here involved. It was hence the plain duty of the federal court to afford appellee relief with respect to appellant's liens here involved if appellee was shown by the proof to be entitled to such relief.

(5) None of the cases cited by appellant in support of its plea in abatement go to the extent necessary to aid its plea. They are all merely to the effect that when a proceeding in rem is pending in any court, that court has exclusive jurisdiction of the property involved to the extent necessary to effectuate its judgment according to the scope of the proceeding in which its prior jurisdiction is invoked—but no further. Appellant in effect claims that because it has brought a suit in the state court for the foreclosure of a specific lien upon certain property, it may cumber the records with countless other and different claims of lien and that no court except that in which its foreclosure of the one lien is pending has jurisdiction to quiet title as against the other claimed

liens, concerning which no litigation is pending. No decsions go so far.

The cases cted by appellant are all cases where the prior litigation had resulted in the actual custody of the property by the court in which the prior suit was pending; or where the scope of the litigation required such custody. In such circumstances, the property was in the actual or potential custody of the court; and all conflicting claims to such property must then necessarily be determined by the court having or contemplating such custody. No such situation is presented here.

(6) Even with respect to property in possession of a court, the true rule is thus stated in United States v. Klein, 303 U. S. 279, 281; 82 L. Ed., 840, 843, as follows:

> "While a federal court which has taken possession of property in the exercise of the judicial power conferred upon it by the constitution and laws of the United States is said to acquire exclusive jurisdiction, the jurisdiction is exclusive only in so far as restriction of the power of other courts is necessary for the federal court's appropriate control and disposition of the property (citing authorities). Other courts having jurisdiction to adjudicate rights in the property do not, because the property is possessed by a federal court, lose power to render any judgment not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of

the property (citing authorities). Similarly a federal court may make a like adjudication with respect to property in the possession of a state court" (citing numerous authorities).

We quote from Boynton v. Moffatt Tunnel Improvement District, 57 Fed. (2d), 772 (C. C. A. 10th), as clarifying and elucidating the meaning of certain general expressions used by the Supreme Court of the United States in cases cited by appellant:

"A recent case is Harkin v. Brundage * * * the decision of which, in our judgment, controls the disposition of this case. In that case the federal court appointed a receiver in an action brought by a creditor. Prior to the filing of the bill in the federal court, a stockholder had filed a bill in the state court, in which a receiver for th esame properties was applied for. Both cases were quasi in rem; in both cases, control over the same properties was applied for. Both cases effectuate any decrees which might later be made. The same res was involved in the two suits. The state court was prior in time, and, by the general rule, was therefore, prior in right. But the Circuit Court of Appeals held that the two actions were so different that there was no conflict between the two jurisdictions, and that therefore the federal court should proceed, irrespective of the pendency of the state court action. Harkin v. Brundage (C. C. A. 7), 13 Fed. (2d),

617. The Supreme Court reversed this ruling upon another point, but held that the holding of the lower court was correct in this respect * * *.

"Applying that rule to the facts, the (Supreme) court said at page 45 of 276 U. S.: 'We conclude that if the decision of this motion turned on the question of priority of jurisdiction on the face of the two bills, it could not be said that the courts were exercising concurrent jurisdiction. The creditor's bill conferred on the court the power to enjoin the judgments and executions of creditors and the establishment of undue preferences among the creditors, whereas in the stockholder's bill no such remedy was asked and could hardly be afforded without amendment and further allegation and prayer'.

"The Supreme Court relied upon the opinion of Judge Grubb in the leading case of Empire Trust Company v. Brooks (C. C. A. 5th), 232 Fed., 641, and characterized it as 'a carefully reasoned opinion'."

In that case Judge Grubb said:

"However, where the issues in the subsequent suit are different from those involved in the first suit, and the subject matter is not identical, there can be no infringement of the jurisdiction of the court in which the first suit is pending, by reason of the institution of the second suit in a court of concurrent jurisdiction. * * * Unless it can be said that the issues involved, the relief

> sought, and the parties to the suit in the federal court were included substantially in the lis pendens of the prior suit in the state court, the jurisdiction of the former did not conflict with that of the latter".

The case of Ingram v. Jones (C. C. A. 10th), 47 Fed. (2d), 135, is almost precisely in point here and illustrative of the principles governing alleged conflicts of jurisdictions in actions in rem. On May 25, 1923 the guardians of Leonard Daniel Ingram brought suit in the state court of Oklahoma to foreclose a mortgage belonging to their ward. Richard Love, one of the mortgagors, filed an answer and cross-complaint setting up fraud in the giving of the mortgage and prayed that it be cancelled. Ingram (who had meanwhile become of age) answered the cross-complaint, denying the fraud. On December 5, 1926, while the case was still pending in the state court, Ingram brought suit in the federal court asking the foreclosure of the same mortgage and also the foreclosure of a prior mortgage given by the mortgagors to one Campbell which Ingram claimed to have paid off from the proceeds of his loan and to the rights under which he claimed subrogation by reason of such payment. The federal trial court dismissed the suit by reason of the pendency of the state court action. On appeal, the Circuit Court of Appeals said:

> "On the other hand, where the issues in the subsequent suit are different from those involved in the first suit and the subject matter is

not identical; that is, where the two suits involve different controversies, notwithstanding they relate to the same property, there can be no infringement of the jurisdiction of the court in which the first suit is pending by reason of the institution of the second suit in a court of concurrent jurisdiction * * *.

"A decree foreclosing the Campbell mortgage will in nowise interfere with the jurisdiction of the state court * * * invoked by the answer and cross petition of Robert Love seeking cancellation of the Ingram mortgage on the ground of fraud. It follows that the instant suit may properly proceed for the subrogation of Ingram to the lien of the Campbell mortgage and for the foreclosure thereof. The decree is reversed", etc. * * *.

In the case of Morrow v. Superior Court (Calif.), 48 Pac. (2d), 188, decided August 16, 1935, the court was considering a conflict of jurisdiction between two state courts in rem.

"The issues in the two suits are not identical and the most that can be said is that both cases relate to the same land. The plaintiff in the second action did not choose to intervene in the state court but saw fit to file suit in the federal court, setting forth a cause of action against all of the parties to the first action * * *.

"The state court had not taken possession or control of the land and had not been asked to

determine all controversies relating to the title thereto but only those based upon one contract and as between certain parties. A new controversy is involved in the second action."

The proper scope of the rule and its limitations is succinctly stated by the Supreme Court of the United States in Watson v. Jones, 13 Wallace, 679; 20 L. Ed., 666, as follows:

"But when the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or at least such as represent the same interests; there must be the same rights asserted and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of it *could be pleaded in bar as a former adjudication of the same matter between the same parties*". (Emphasis ours).

Though the foregoing decision was rendered many years ago, it is still considered good law, as shown by the case of Detroit Trust Company v. Manilow (Mich.), 261 N. W., 303, decided June 3, 1925. It is said:

"As a rule, when a court of competent jurisdiction becomes possessed of a case, its authority continues until the matter is finally and completely disposed of, and no court of co-ordinate

authority is at liberty to interfere with its action * * *. However, this rule is subject to the limitation that the two proceedings must be in all respects identical as to the identity of the parties, the subject matter involved, the nature of the remedies, and the character of the relief sought."

A suit in rem in one court where such court has not taken the property into its custody or control is not a bar to a second suit in rem in another court which involves different issues but affects the same property.

"But it is not the law that the commencement of a suit in the federal court to enforce a mechanic's lien on property, precludes the foreclosure of a mortgage on the same property in the state court. The lien action was not one in rem except in a qualified sense. There was no seizure of property and no possession of it taken by the court or necessary to it at any stage of the proceeding. The situation was essentially different from one where the property is in the actual custody of the court".

National, etc. Works v. Oconto City Water Supply Co. (Wis.), 81 N. W., 125.

"Condemnation proceedings involving the same land pending in the state court are no bar to the maintenance of a similar action in a federal court, where the state court in taking jurisdiction did not take possession of the res".

Franzen v. Chicago, etc. Ry. (C. C. A. 7th), 278 Fed., 370.

"It is a general rule, strongly fortified by both reason and authority, that one will not be restrained by injunction from proceeding with a pending suit in equity in the courts of another jurisdiction except to prevent a manifest wrong or injustice; or otherwise stated, unless it clearly appears that full and complete relief cannot be obtained in such pending suit".

American Seeding Machine Co. v Dowagiac Co., 241 Fed., 875.
Frink Co. v. Erickson, 20 Fed. (2d), 707.

Pendency of suit to enjoin exercise of powers of sale in security deeds and for accounting and cancellation of deeds where court took no action equivalent to seizure of res, held not to authorize enjoining grantee from suing on security deeds in federal court. (Syllabus).

Royster Guano Co. v. Stedham (Ga.), 172 S. E., 555.

"If the parties were the same in the state court suit and if the issues and controversy were the same that they are in this court, even though the action is mildly in rem and neither court has taken possession or control of the res, I would sustain the plea in abatement or as such plea is now called, the motion to dismiss; but with the difference between the suits, in parties, issues

and prayers, the motion does not seem to be well taken".

Lewis v. Schrader, 287 Fed., 893.

"Assuming that the federal courts have possession of the res, it follows that they should enjoin proceedings in the state court affecting such possession; but questions not involving such possession may properly be litigated in the court which first acquired jurisdiction".

Equitable Trust Company v. Pollitz (C. C. A. 2d), 207 Fed., 74.

The citation of the above authorities on the part of appellee is doubtless superfluous. Even brief reflection by this court must result in the same conclu- County and by Judge Cavanah to the effect that no possible action that the federal court might take in this suit with reference to the liens for the years 1935 to 1937, inclusive, could have any possible effect upon the suit or suits pending in the state courts at the time of the commencement of this suit. If in this suit the appellant's liens here involved were declared invalid by the federal court, in accordance with the prayer of appellee's complaint, such determination could have no possible effect on the custody or control of property which no other court had in its possession either actually or constructively.

(7) It is urged by appellant that the court below should have abated this action because the case is asserted to turn upon the construction of state

status involved in the foreclosure suits pending in the state court, and that the federal court should have indefinitely stayed proceedings in this action to await some possible construction by the state supreme court of the statutes involved.

This is a novel doctrine. Adherence to it would indefinitely paralyze the functions of federal courts within the sphere of jurisdiction expressly conferred upon them by the acts of Congress. It is elementary that a federal court not only should not but cannot abrogate the functions imposed upon it by law.

> "As a sequel to what we have said, we hold that the district court was correct in the opinion that it had jurisdiction * * * but we think it erred in declining to exercise the jurisdiction. Decision that there was power to hear and determine removed any question of discretion and left a bounden duty to proceed to a decree".
>
> Southern California Edison Co. v. Hopkins (C. C. A. 9th), 13 Fed. (2), 814, 820.

But an additonal and cogent reason why the lower court should have proceeded with this case is that it primarily involved issues controlled in part by *federal statutes* and the Federal Constitution and that the precisely identical questions presented had already been determined by this court and by the Supreme Court of the United States in the case of Brown & Chapin, Trustees v. Portneuf-Marsh Valley Canal Company, 299 Fed., 338; reversed by this court 5 Fed. (2), 895; reversal upheld 274 U. S.,

630; 71 L. Ed., 1243. For brevity, we shall hereafter refer to that case as "the Portneuf case".

In these circumstances, it was especially the duty of the court below to apply to the controversy the law so declared.

Concordia Insurance Co. v. School District, 282 U. S., 575; 75 L. Ed., 528;
Reese v. Peck, 18 Howard, 595; 15 L. Ed., 518;
Burgess v. Seligman, 107 U. S., 20; 27 L. Ed., 359.

(8) It is briefly suggested under certain headings in "Summary of Argument" in appellant's brief (headings 4 and 5, pages 22 and 23) that this being a suit to quiet title, the scope of such proceedings is not broad enough to enable the court to determine the relative priority and dignity of the conflicting claims asserted. The trial court found otherwise (R. 110, 149) and its conclusion was correct. Under the pleadings in this case (R. 20), the court has, under the applicable state and federal law, full authority to determine the relative dignity and priority of any conflicting claims or liens asserted by the parties.

Section 9-401, I. C. A.,
Coleman v. Jaggers, 85 Pac., 894; 12 Ida., 125;
Blackman v. Pettengill, 164 Pac., 358; 30 Ida., 241;
Hanley v. Beatty (C. C. A. 9th), 117 Fed., 59.

II.

APPELLEE'S CLAIM TO THE PROPERTY HERE INVOLVED IS PRIOR AND PARAMOUNT TO APPELLANT'S ALLEGED MAINTENANCE LIENS.

(A)—This Case Is Controlled by the Portneuf Case, Supra.

It is thought that the Portneuf case, supra, completely controls the issues here presented for decision. We believe that an examination of the various opinions of the various courts in that case and the briefs and record upon which those opinions are based will show that every contention that can be urged by appellant in the case at bar were met and disposed of adversely to it in the Portneuf case, and that no distinctions whatever between that case and this can be pointed out with respect either to the status of the parties, the status of the property involved, or the issues presented. That case involved a Carey Act irrigation project in Bannock County, Idaho, was decided by the trial court in harmony with appellant's contentions made in this case, was reversed on appeal by the unanimous decision of this court, and upon certiorari to the Supreme Court of the United States the decision of this court was unanimously upheld. In the case at bar the court below after very careful examination of the opinions, briefs, and record in the Portneuf case, has concluded "that the issues presented and decided and the status of the respective parties are identical in every respect" (R. 163). The printed record and briefs in that case on appeal to this court are on file here

(No. 4405); and to demonstrate the correctness of the conclusion reached by the trial court and to elucidate the identity of the issues decided, it will be necessary to refer to such record and briefs.

(B)—Status of the Parties in the Portneuf Case As Compared to Status of the Parties in the Present Case.

In the Portneuf case, the plaintiffs were trustees for the bondholders of the project and the suit was brought against the construction company and the operating company for the foreclosure of the trust deed covering the project. The construction company made default, leaving the operating company as the only defendant. The object of the suit, in so far as relief against the operating company was concerned, was to establish the priority of the lien of the bondholders for construction costs as against the lien of the operating company for maintenance assessments. It was, in effect, a suit to quiet title of the bondholders against the assessments of the operating company (Portneuf R. 45—prayer of complaint).

In the Portneuf case, the operating company in its answer to the complaint (Portneuf R. 102) set up the lien of certain assessments for operation and maintenance, and the sole question before the court was the priority of the assessment liens of the operating company as against the lien of the bondholders for the cost of reclaiming the land.

In the case at bar, the relative status of the parties is identical. Again, this is a suit to quiet title by the bondholders against the operating company's assessments: The Idaho Farms Company is really the bond-

holders because the assets originally secured by the trust deed upon the project have been turned over to the bondholders in lieu of foreclosure. While in the Portneuf case the construction company, as stated, made default in the foreclosure action and thus eliminated any consideration of its equity, in this case, the construction prior to this suit had by voluntary transfers of the mortgaged property and the reissuance of its capital stock to the bondholders made the latter the sole parties in interest. The detailed circumstances of this voluntary transfer to the bondholders are set out in the trial court's opinion and findings and are in no respect controverted (R. 147; 90, 92).

Appellant vigorously urged in the court below, and to some extent suggests here, that because the transfer to the bondholders of the property here involved has been accomplished by voluntary action in lieu of foreclosure of the trust deed (Ex. 9; R. 191) and the trust deed has been released of record the bondholders cannot now assert the same rights in the property as the trustee for the bondholders might have done.

We think this position is wholly untenable. The law will imply no merger of the trust deed to appellee's disadvantage and to the benefit of appellant's secondary liens. The authorities to this effect are unanimous. We shall hereafter cite a few of them under another heading. So it is clear that the controversy here, as in the Portneuf case, is a controversy between the bondholders of the project and the operating company as to their respective claims upon

the property involved. In each case, the construction company, prior to the building of the system or the sale of water rights therein, had mortgaged it in its entirety to secure money for construction costs; so the status of the contending parties here and in the Portneuf case are identical.

(C)—Identity of Status of Property Involved in Portneuf Case.

Appellant claims that the Portneuf case is distinguishable from this case in that the property involved here comprises land and water rights acquired by foreclosure of the previously existing settlers' water contracts or by quitclaim deeds in lieu of foreclosure. While it is insisted that in the Portneuf case the property involved was not in such condition; and that the controversy in the Portneuf case related merely to the relative rights of the construction company and the operating company with respect to maintenance assessments levied prior to the foreclosure of the water contracts or prior to quitclaim deeds taken in lieu of foreclosure.

But again no such distinction exists. An examination of the records and files in the Portneufcase, together with the opinions of the successive courts deciding the case, shows that a large part of the property there involved was in precisely the same status as are the lands and water rights involved in this suit.

Among the properties involved in the Portneuf case with respect to which the bondholders' claim was held paramount to the operating company's lien were

lands and water stock acquired by foreclosure of the individual settlers' contracts. Exhibit "D" introduced in evidence in that case clearly discloses this (Portneuf R. 214, et seq.). This Exhibit "D" is a list of sheriff's deeds taken on foreclosure and running to the plaintiff trustees for the bondholders under the trust deed. Plaintiffs' Exhibit "D-1" in the Portneuf case (Portneuf R. 217) is a typical sheriff's deed illustrating the method by which the property was so acquired. The property shown and listed in Exhibit "D" in the Portneuf case is, therefore, in the precisely identical status as those properties of defendant in the present case which are lsited in Exhibit I attached to the findings (R. 114) as acquired on foreclosure of water contracts.

Again, Exhibit "E" in the Portneuf case (Portneuf R. 221) is a list of lands and water rights acquired by quitclaim deed in lieu of foreclosure of the Carey Act contracts involved. The record there discloses that these quitclaim deeds were taken in the name of W. Rodman Peabody as agent of the bondholders and their trustees for the purpose of avoiding foreclosure proceedings under the water contracts (Portneuf R. 144). Plaintiffs' Exhibit "E-1" in the Portneuf case (R. 225) is a typical quitclaim deed, illustrative of the group of conveyances by which this property was thus acquired.

In the present case, part of the property here involved, as shown by Exhibit I attached to the findings (R. 125, et seq.) was acquired under precisely similar quitclaim deeds under precisely similar cir-

cumstances and is in precisely the same situation. In the Portneuf case, the quitclaim deeds were taken in the name of Peabody as agent for the bondholders and their trustees. In this case, the quitclaim deeds were taken in the name of the Investment Company, all of the capital stock of which was in the hands of the bondholders' committee and which as shown by the undisputed evidence and the findings (R. 203; 90), has been since 1913 the mere agent and instrumentality of the bondholders for the holding for resale and the reselling of the repossessed properties. The status and function of the Investment Company in the present suit is precisely the status and function of W. Rodman Peabody in the Portneuf suit; that is, in both instances for convenience the title to the repossessed properties was taken in the name of a mere agent of the bondholders who held the property in trust for them until resale to other settlers (R. 162).

An examination of Exhibit "E" in the Portneuf case (Portneuf R. 221) discloses that the lands so acquired by quitclaim deeds were acquired in the years 1919 and 1920. The defendant operating company in the Portneuf case relied for its liens upon various assessments levied during the years 1915 to 1922, inclusive (defendants' Exhibits 1 to 16, inclusive, in the Portneuf case—R. pp. 269 - 360, inclusive).

Defendants' Exhibits 10 to 15, inclusive (Portnef R. pp. 326 - 356) show assessments levied from

1920 to 1922, *all of which were subsequent to the dates of the quitclaim deeds.*

It is thus completely demonstrable that the status of the property involved in the Portneuf case is precisely identical with the property involved in this case, and so the trial court found from minute comparison of the two records (R. 163).

(D)—Identity of Questions Presented for Decision.

(1)—Merger.

One of the principal points urged by appellant on this appeal is that the foreclosure proceedings upon the settlers' water contracts by which part of the property involved was acquired through sheriff's deed, and the proceedings in lieu of foreclosure which resulted in the quitclaim deeds whereby other parcels of the property was acquired, operated to extinguish appellee's liens for construction charges; in other words, that a merger resulted; and that thereafter the property thus repossessed by appellee became subject to maintenance liens precisely as are any other lands and water rights of the project.

The trial court in the Portneuf case adopted that view. Appellant here has not been able to state its contentions more forcefully than was done in the following excerpt from the opinion of the trial court in the Portneuf case, 299 Fed., 338 (Portneuf pp. 440-441):

> "I find no provision expressly authorizing the taking of voluntary conveyances directly from the settler, but if, as contended by the plaintiffs, that authority is implied, and a conveyance so

taken has the status of a sheriff's deed on foreclosure, then in all cases where they have acquired the settler's rights, and have become the owners of both land and water, they hold such land and water in trust for the promoting company, subject to the lien of the trust deed. But however that may be, plainly the liens of the water contracts originally issued to the settlers, have been fully extinguished, and the statutory provision under consideration could not longer have any application. And, it may be added, together with the lien of the contract has gone the obligation of the settler to pay, for under the provision of the trust deed, above referred to, the trustees were authorized only to bid the full amount due upon the contracts, including interest and costs, and presumably when voluntary conveyances were taken the settlers' contracts were thus satisfied and terminated. So that if we were to take the view of the statute contended for by the plaintiffs, there would be no lien superior to the right of the operating company under its assessment sales, and there is nothing at all due from the settlers to the promoting company or the plaintiffs, and neither it nor they have any lien at all by virtue of the water contracts, either superior or inferior".

The trial court's reasoning quoted above was wholly rejected on appeal both by this court and the Supreme Court. Both appellate courts pointed out that the status of the property there being considered

was in precisely the same status as the property involved in this case. The Supreme Court said:

> "The project did not flourish. Some of the settlers having failed to make payment of installments due on the contracts of purchase, respondents acquired the land, water right and stock, in some cases by foreclosure and in others by quitclaim deeds * * *. The present suit was brought by respondents to foreclose the mortgage on the irrigation system and to foreclose any claims that the two companies might make to the land, water rights and stock acquired by respondents in the enforcement of their rights against the entrymen under the contracts of purchase * * *. The operating company as a defense set up by answer its ownership of some of the stock in controversy acquired under a lien alleged to be superior to that of respondents".

In the operating company's brief before the Supreme Court of the United States in the Portneuf case, it sought to uphold in language as follows the same theory of merger as is here advanced by appellant:

> "The water itself having been made appurtenant to land, and the land having been mortgaged as security to the construction company, the construction company held both the land and the water as security. Upon any default on the part of the individual contract holder, the construction company had the right to foreclose its

> mortgage on the water and the land. If it foreclosed its mortgage and obtained title to the water and the land through that means, then it stepped into the shoes of the individual settelr who had previously owned it. The water having been theretofore made appurtenant to land, then the stock in the operating company which represented that water remained subject to assessment regardless of who might own the stock. The fact that the construction company obtained title to the land and water through foreclosure proceedings against the original contract holder did not create any different situation than if the original contract holder had conveyed his land and water to some other individual".

What we shall here say in answer to appellant's contention that the enforcement of the Carey Act Water contracts resulted in a merger is substantially a paraphrase of the brief filed in this court by the appellant trustees for the bondholders in the Portneuf case.

Appellant's contention that the enforcement of the settlers' water contracts by the bondholders resulted in a merger is ineffectual because it leaves out of consideration the one essential and vital factor in the plan of Carey Act reclamation, which it is always necessary to keep in mind in determining the relative priority of the construction liens and the operating company liens. The factor is this:

Prior to the sale of the water right to the settler, the construction company concededly held, exempt

from assessment, the stock in the operating company which represented the water rights sold. When the construction company sold the water right to the settler, what did it sell? Property exempt from assessment for maintenance. To what then did its purchase money lien attach? Obviously the same property which it sold and in the same condition as at the time of sale—namely, property exempt from assessment. Its lien related back to the time of sale to the settler. When it or its bondholders enforced the purchase money lien which thus related back to the time of sale, it obtained the property on foreclosure in the same status as before the sale to the settler; that is, exempt from assessment until resold to some other settler. The appellant here still holds and always has held the water stock (R. 208). The contract of sale unless and until full payment was made was never anything other than a conditional sale. The Idaho supreme court so expressly holds.

> Bennett v. Twin Falls & C. Canal Co. 27 Ida. 652.

The contention that by the enforcement as against the settler of the Carey Act contract operated to extinguish any lien of the construction company or the bondholders contained and contains the inherent fallacy of assuming that a *merger* was effected by such enforcement when the simplest principles of equity are violated by such assumption.

It is a familiar principle in equity that a lien will not be considered as merged in a judgment or in a deed where the effect of such merger would be to

validate a junior claim, or otherwise to put the party against whom the merger is urged in a disadvantageous position with respect to a third party.

In the case of Factors & Traders Insurance Company v. Murphy, et al, 111 U. S., 738; 28 L. Ed., 582, the Supreme Court of the United States says:

> "Where an incumbrancer, by mortgage or otherwise, becomes the owner of the legal title or of the equity of redemption, the merger will not be held to take place if it be apparent that it was not the intention of the owner, or if, in the absence of any intention, said merger was against his manifest interest".

In the case of Wilson v. Linder, 21 Ida., 576, the Supreme Court of Idaho said:

> "It has been argued by counsel for respondents that the tax certificates * * * and all right acquired under them, was immediately merged in the deed executed by Jesse Wilson * * *. This contention is made upon the principle of law that where legal and equitable titles both meet in the same person, the equitable merges in the legal title.
>
> "This is true as a general proposition but with many exceptions and qualifications, one of which is that there will be no merger where it will prove inequitable *or to the disadvantage of the person who is honestly seeking to protect his right*". (Emphasis supplie).

Appellant's brief cites several authorities to the effect that *in law* a merger always takes place when a greater estate and a less meet in the same person in one and the same right without any intermediate estate. In each instance, the quotation given is partial and misleading. Almost invariably the very same section of the text from which plaintiff quotes contains such expressions as the following:

> "Where a mortgage encumbrancer becomes the owner of the legal title or of the equity of redemption, a merger will not be held to take place if it be apparent that it was not the intention of the owner or if in the absence of any intention the merger would be against his manifest interest".
>
> Jones on Mortgages, 8th Edition, Section 1080.
>
> "If no intention has been manifested, equity will consider the encumbrance as subsisting or extinguished as may be most conducive to the interests of the party".
>
> Idem.
>
> "A merger will not be held to result wherever a denial of a merger is necessary to protect the interests of the mortgagee, the presumption being, in the absence of proof to the contrary, that he intended what would best accord with his interests. * * * If there is no evidence of intention, and it appears to be a matter of entire indifference to the mortgage whether there is a

merger or not, then equity will follow the rule at law and a merger will be held to have taken place".

41 C. J., Section 874.

Authorities to the above effect could be multiplied indefinitely.

The same general equitable principles which deny the existence of a merger for the benefit of a third party did in the Portneuf case and do here deny the doctrine of merger where its assertion creates *vulnerability* to a subsequent lien of a third party.

It was not the intent of the federal or the state laws or the intent of the parties expressed in the pertinent contracts and other documents relating to the subject that at any time the interest in the irrigation system of the construction company and its bondholders, represented by the cost of such construction and for which it had initially a paramount lien, should be subject to maintenance assessments of the operating company. Before the sale to the settler, such interest was not subject to assessment by the plain terms of the state contracts. After sale to the settler it was not subject to assessment. The interest of the settler evidenced by his payments was subject to assessment, and that alone.

The situation of the construction company and its bondholders with respect to the property was a unique and distinctive situation. Initially it built the project and owned it, but, as stated above, it owned it only in a trustee capacity. It had bound itself to sell water rights to anyone who might enter the

Carey Act land. It could not pick its risks. Any citizen of the United States qualified to enter Carey Act land, no matter how impecunious or how inexperienced in farming, could apply for the purchase of a water right. The construction company was bound to enter into the purchase contract. In case of default, its only remedy was by foreclosure. Unless it foreclosed its claim against the settler for the purchase price, it became barred by the statute of limitations. Meridian v. Milner, 47 Ida., 439; 276 Pac., 313. It was forced to foreclose; it had no alternative or election. To protect its paramount lien, it or its bondholders was obliged to bid in the property. One of the plainest of the "implications to be found in the general nature and purpose of the (Carey Act) plan itself" as referred to in the decision of the Supreme Court of the United States in the Portneuf case is that after the uncompleted sale to the original settler resulted in foreclosure, the construction company or its bondholders held the repossessed property in the same situation in which it held it prior to the unsuccessful sale; namely, exempt from assessment.

This is true not only under the general principles of merger, but because of the nature of the property sold and the nature of the settler's purchase contract evidencing the lien.

We have for brevity referred to the settler's purchase contracts as effecting a "sale." But the time nature of the contract whereby a Carey Act construction company sells a water right to a settler is elucidated by the Supreme Court of Idaho in the case of

Bennett v. Twin Falls North Side Land and Water Company, 27 Ida., 652. The court there said:

> "It is evident from the provisions of the settlers' contract that the purpose was not to make an *absolute conveyance* of the water right * * *. *The state contract provides that pending the fulfillment of the contract between the entryman and the Land & Water Company, the entryman may have the right to the possession and enjoyment of the water right* * * * nor can it reasonably be urged that the title to the water right *passes to the purchaser upon the execution of his contract* with the Land & Water Company, for in the present case, as well as practically every Carey Act project, there was no water right in existence at the time of the execution of water right contracts. There is nothing in the contract to vest the water right in the entryman *unless he makes payment for the same* * * *". (Emphasis ours).

The above case dealt with the identical Carey Act project and the identical state contract involved in this appeal (Par 8 State Contract; R. 183).

The settler's contract created *as against him* what is analogeous to purchase money mortgage. Water rights in Idaho are real property or real estate.

> Section 61-405, Idaho Code Annotated,
> Nelson v. Proctor, 19 Ida., 727,
> Clark v. Paddock, 24 Ida., 142,
> Bennett v. Twin Falls, etc. Co., supra.

The construction company's lien *as against the settler* is governed by the equitable principles generally applicable to such purchase money mortgages.

> "A mortgage given for the unpaid balance of purchase money on a sale of land simultaneously with a deed of the same and as part of the same transaction is entitled to the highest consideration of a court of equity and takes precedence of prior judgments and all other existing and subsequent claims and liens of every kind against the mortgagor to the extent of the land sold."
>
> 41 C. J., 528, Sec. 470.
>
> "A purchase money mortgage is what the term implies and is predicated on the theory that on the simultaneous execution of the deed and mortgage the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and without stopping rests in the mortgagee. It follows, therefore, that no lien of any character can attach to the title of the mortgagee".
>
> Keith v. Cropper, 196 Iowa, 1179.

This is the doctrine of instantaneous seizin. The title does not stop beneficially in the purchaser, but rests always in the mortgagee. Dower rights and homestead rights do not attack. Liens against the purchaser prior in time even to the purchase money mortgage are cut off.

> Kneen v. Halin, 6 Ida., 621.

In accordance with the foregoing equitable doctrine, the Carey Act settler who executed a water contract, made default in his payments, and was eliminated by foreclosure was a mere shadow. The beneficial interest in the project sold to him remained always in the construction company and its bondholders to the extent of the unpaid portion of the contract price of the water right. The Supreme Court of Idaho in the Bennett case, supra (27 Ida. at p. 655) referred to the sale to the settler as a *conditional* sale. To be sure, such equity as the settler possessed during his tenure was always subject to assessment by the operating company, but no interet of the construction company or its bondholders representing the cost of reclaiming the land can ever be subject to assessment until the purchase price of the water right as fixed by the state contract is paid.

It is urged in appellant's brief herein (p. 63, et seq.) that the settler's water purchase contract had no resemblance or analogy to a purchase money mortgage because the construction company never had anything to sell; that it was merely a construction company, holding, constructing, and having the irrigation works and water rights in a trustee capacity.

The contention that the relation of the construction company to the project is that of a trustee is wholly sound. But the very purpose of the trust and its functions under the trust was to enable it to make sales of water rights to settlers. It requires some temerity on the part of appellant to contend that the

construction company never had anything to sell, in the face of the most basic provisions of the state contracts (Exhibits 1, 2, and 3; R. 182,et seq.) reiterating the paramount obligation of the construction company "to sell water rights * * * without preference or partiality other than that based upon priority of application". Aside from those provisions of the state contract, requiring the construction company to build the system, practically the entire contract concerns itself *only* with the terms and conditions of sales to settlers. Yet notwithstanding appellant urges here that the construction company never had anything to sell!

The very numerous citations set out on pages 64 and 65 of appellant's brief, and also those listed on page 34 of its brief, are conclusive in support of *appellee's* fundamental position, which is well stated in appellant's brief (p. 63):

> "* * * that it has been held and is now firmly settled that appellee was only a construction company; that the water appropriated * * * was not appellee's private property but it was given a water permit in trust for the future settlers; that it served only as a conduit for transferring rights to the use of water from the state to the settler * * * appellee was not allowed to make any profit through the sale of water * * *".

We agree. The sole purpose of the trust was the making of sales to settlers, and the only right that appellee is seeking in this suit and the only relief

granted to it by the court below is the right to make such sales without profit; but free in the meantime from confiscation of the property through the mechanism of appellant's maintenance assessments.

(2)—Distinction as to Form of Assessments in Portneuf Case and Here.

In the Portneuf case, the maintenance liens asserted by the operating company were in form assessments levied upon the capital stock of the operating company, while here the maintenance liens are based upon proceedings under Chapter 19, Title 41, Idaho Code Annotated (Sections 41-1901-41-1910, I. C. A.). Appellant urges that this constitutes a distinction between the two cases.

This is a distinction wholly without a difference. Indeed the Supreme Court in the Portneuf case comments upon this alternative method of assessment that might have been pursued by the Portneuf operating company and expressly construed the statutes under which the defendant here relies for its alleged liens.

Sections 41-1901 to 41-1910, Idaho Code Annotated, were formerly Chapter 138 of the Compiled Statutes of Idaho (Sections 3040-3049, inclusive).

The Supreme Court of the United States in the Portneuf case (71 L. Ed., at page 1270) said:

> "It is significant also that chap. 138 of the Compiled Statutes of Idaho, which provides for the regulation of the Carey Act operating companies, contains specific provisions for establishing maintenance liens on Carey Act lands to

> which the water rights are appurtenant, by filing a notice of lien with the county recorder (Secs. 3040, 3042), a procedure which does not seem to have been followed here. There are provisions for foreclosure and sale of the land with appurtenant water right. Secs. 3045, 3046. Section 3040 describes the maintenance lien as a 'first and prior lien', but it is expressly provided (Sec. 3049) that this article shall not affect 'any other lien or right of lien given by the laws of this state, or otherwise, '*thus in terms giving the lien authorized by Sec. 3019 priority*". (Emphasis ours).

From the language above quoted it will be seen that the Supreme Court construed the sections of the statute upon which the appellant relies for the priority of its maintenance liens as "*thus in terms giving the lien authorized by Sec. 3019 priority*".

Section 3019, Compiled Statutes, referred to in the Supreme Court's opinion is now Section 41-1726, Idaho Code Annotated, and reads as follows:

> "Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last

deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired."

It is apparent from the foregoing that while the maintenance liens asserted in the Portneuf case were based upon stock assessments concerning which there was no specific language in the statutes defining their relative priority with respect to Carey Act construction company liens, the Supreme Court of the United States, in determining their effect, pointed out that the alternative method of assessment which might have been pursued (and which was pursued by appellant in the case at bar) was based upon statutes which "in terms" recognized the priority of the Carey Act construction company lien. Clearly, in view of the above, no comfort can be derived by the appellant here from the fact that the maintenance liens asserted are based upon proceedings under Chapter 19, Title 41, Idaho Code Annotated, instead of upon corporate stock assessments.

It is clearly apparent that the Supreme Court in the Portneuf case was considering *the substance and effect* of maintenance assessments, whatever might be their *form or method.*

(3)—Time When Construction Lien Attached.

The lien for construction costs came into existence by operation of law upon compliance by the construction company with the terms of the law. At the time the state contracts were executed, the law (now Section 41-1726, Idaho Code Annotated) declared:

> "Any * * * company * * * furnishing water for any tract of land shall have the first and prior lien on said water right and land upon which said water is used for all deferred payments for said water right".

Therefore, when the construction company made water available for any tract of land, its construction lien attached; the lien antedated even the settler's contract, although the amount of the settler's purchase price fixed the amount of lien. As was said by the Idaho Supreme Court in Columbia Trust Company v. Eikelberger, 42 Ida., 90 ,at page 105):

> "Since the settler's contract does not itself create the lien, the right thereto, mentioned in the first state contract, must be found in the statutes. The federal statute authorizes the state to create a lien against the land. Under the state law (C. S., Sec. 3019) a lien is created against both the land and the water right, but it is not stated therein when such lien attaches, and our attention has not been called to any provisions of the first state contract in that connection. In Childs v. Neitzel, 26 Ida., 116-140, on rehearing, it was said that the liens of water contracts do not attach until the water has been made permanently available to the land. That statement of the law was amplified in Idaho Irr. Co. v. Pew, 2 6Ida. 272 * * *".

By the plain terms of the state contracts (Para-

graph 9-R. 185) and of the plaintiff's by-laws (Exhibit 8, R. 191) the construction company's interest in the irrigation system was not subject to assessment until the stock representing such interest was sold to settlers. If the water rights here involved had never been sold to settlers, they would concededly not be subject to assessment, even up to the present time or indeed for an indefinite period hereafter.

After sale of the water rights to settlers, the shares became subject to assessment; *but only to the extent of the settler's interest therein.* This is clear, beyond any doubt, from plaintiff's own by-laws (Exhibit B —Article 10, Section 5) wherein it is recited that

> "all assessments * * * must be paid by the purchaser or owner of the stock *and not by the Twin Falls North Side Land & Water Company, its successors or assigns*".

If the operating company levied assessments upon the property while under contract of sale to settlers, it could under the law have foreclosed its maintenance lien and divested the settler of his rights under the contract; but if the operating company had purchased the property upon such foreclosure, it would have continued to hold the property subject to the prior and paramount construction lien; so would any other purchaser at such foreclosure sale for delinquent assessments.

(4)—Appellee's Rights Under Trust Deed.

In the Portneuf case, the United States Supreme Court stated that "the case was disposed of below on

the theory that the trustees (for the bondholders) as against the operating company, so far as the water rights and stock were concerned, stood in the position of the construction company".

It is reasonably apparent, however, that neither this court nor the Supreme Court wholly concurred with the view of the lower court. The rights of the bondholders were held to have attached under a mortgage on the entire irrigation works, given and recorded when construction work on the project was barely begun, and long before the system was turned over to the operating company. The same situation obtains here. Indeed it clearly appears that the mortgage (or trust deed) here involved was executed November 1, 1907, and long prior even to the state contract of January 2, 1909. No water rights for the land here involved had been sold when the trust deed was given.

Excepting only to the extent of rights acquired by actual settlers through payments on the purchase price of water rights (see Section 41-815, I. C. A.), the trust deed was in all respects an ordinary mortgage on the entire corpus of the property. The water rights sold to settlers and the proportionate interest in the system evidenced thereby were released from th trust deed *only to the extent of such payments* (Sec. 41-815, I. C. A.). The water contracts of the settlers were initially held by the trustee for the bondholders in pledge in connection with the trust deed as security for the bonds. After the enforcement of the settlers' water contracts, the bondholders held

the property thus acquired (being the property involved in this suit) in substituted pledge precisely as previously the bondholders, through their trustees or other agents, had held the settlers' contracts.

As we have heretofore stated, the mere fact that the bondholders have taken over the project by voluntary conveyances and instruments instead of through foreclosure of the trust deed does not affect their rights. No merger will be implied to their disadvantage, or to the benefit of the secondary maintenance liens of appellant.

When the trust deed was given, the construction company certainly had the same right to mortgage the property as appellant would have today; and could it for a moment be contended that if appellant today, as present owner, gave a mortgage on the entire irrigation system and subsequently levied annual assessments pursuant to the identical statutes under which it her claims, it could by foreclosure sales upon such assessments convey title to any purchaser under such assessment foreclosure sales free of the lien of its own prior and paramount general mortgage? Most certainly it could not; nor can it do the same thing here, because its maintenance liens subsequently levied are secondary to the prior general trust deed on the project given by the construction company in 1907.

(5)—State Cases Upon Which Appellant Relies As to Priority of Its Liens.

(A)—The Werner Case.

Just as in the Portneuf case, appellant claims that

the decision of the Supreme Court of Idaho in Continental, etc. Bank v. Werner, 36 Ida., 602; 215 Pac. 458, has construed Section 41-1726, under which appellee claims its rights (formerly C. S. Section 3019) in such manner as to nullify the priority of appellee's construction lien.

The same contention was made in the Portneuf case and was cited by the trial court as sustaining the operating company's contention (Portneuf R. 437). The Werner case was considered by this court on appeal of the Portneuf case (5 Fed. (2), 895) as having so little application to the question here involved that it was not mentioned in the opinion. It was referred to in the opinion of the U. S. Supreme Court merely as sustaining the proposition that "it is an implied term of every lien statute that the lien authorized is subordinate to liens for taxes" (71 L. Ed., at page 1270); and such was clearly the only point decided by the state supreme court in the Werner case.

The question in the Werner case was solely whether the Carey Act construction lien was a lien prior to that of general state and county taxes. Since the laws making all property subject to taxes for the expenses of government long antedated the Carey Act construction lien, the Werner case very properly held that the priority accorded the construction lien was subject to the power of the sovereign to tax. That was the sole question decided.

In discussing the Carey Act lien statute, the Idaho Supreme Court in the Werner case pointed out in

support of its conclusion as to the priority of taxes that under one of the clauses of the lien statute "the only lien to which the lien of a Carey Act contract is superior are those created or attempted to be created by the owner and possessor of the land". This is urged by appellant as supporting the position that the construction lien is subordinate to every sort of lien (including maintenance liens) except those imposed by the voluntary act of the Carey Act entryman. In commenting upon this contention, the Supreme Court of the United States in the Portneuf case following this court, remarked:

> "If the meaning here contended for were given to the statute, liens for the unpaid purchase price would be subject to subsequent materialmen's and mechanics' liens and those of attachment and levy of execution. The statute obviously could not be so interpreted without thwarting its plain purpose and destroying its effective operation".

The Werner case is wholly inapplicable to the question of the relative priority of liens asserted by private parties. It in no manner decides the controversy here presented.

Mere dicta, not relevant to the decision of the actual controversy before the court, is not binding either on the court that uttered it or on other courts.

> Carroll v. Carroll, 16 How., 275; 14 L. Ed., 936;
>
> Matz v. Chicago, and A. R. Co. (CCA8th), 85 Fed., 180;

Leeper Co. v. Neely Co. (CCA 6th), 293 Fed., 967; Certiorari denied, 264 U. S., 586; 68 L. Ed., 863;
Judith Basin Dist. v. Malott (C. C. A. 9th) 73 Fed. (2d) 142.

Indeed, the Supreme Court of Idaho has been most emphatic in enunciating the same well-known rule. In Bashore v. Adolph, 41 Ida., 84, the court said:

> "Opinions must be considered and construed in the light of the rule that they are authoritative only on the facts on which they are founded. General expressions must be taken in connection with the case in which those expressions are used. There is a pronounced line of demarkation between what is *said* in an opinion and what is *decided* by it".

To the same effect:

Stark v. McLaughlin, 45 Ida., 112;
Eldridge v. Black Canyon Irrigation District, 55 Ida., 443.

(B)—Cases Construing Section 41-1901, I. C. A.

Appellant relies upon the language of Section 41-1901, I. C. A., as establishing the priority of its liens over appellee's lien, in that such section declares that the maintenance lien shall be "a first and prior lien except as to the lien of taxes upon the land to which said water and water rights are appurtenant".

Appellant argues that in the case of Carlson-Lusk v. Kammann, 39 Ida., 634; 229 Pac., 85, the Idaho Supreme Court declared such priority in the precise

language of the statute; therefore, that the Supreme Court of Idaho in the above decision has in effect settled the controversy in this case by announcing the priority of appellant's liens.

An examination of the Carlson-Lusk case clearly negatives that it has any such effect. In the Carlson-Lusk case, the plaintiff was foreclosing a mortgage upon property which the North Side Canal Company, Limited, also claimed a maintenance lien. The mortgage there involved was recorded in 1919; the maintenance assessment was for the year 1920. The canal company by reason of its maintenance lien was made a party defendant in the mortgage foreclosure suit; and by cross-complaint it sought the foreclosure of its maintenance lien. The trial court held the canal company's lien prior to the mortgage. On appeal the decision was reversed and the prior mortgage held to be the prior lien. In the reversal, it was necessary for the Supreme Court to go no further than to point out that since the evidence failed to show that the Canal Company was wholly controlled by its stockholders, the section of the statutes it invoked was imapplicable to it.

Since the decision was rested on the above obvious point, it was quite unnecessary for the court to consider in connection with the priority of the maintenance lien asserted under Section 41-1901, that other section (41-1910, I. C. A.) which is a part of the same chapter of the code as section 41-1901 and provides:

"This chapter shall not be held to affect * * *

any other lien or right of lien given by the laws of this state, or otherwise".

As pointed out above, the Supreme Court of the United States in the Portneuf case construed the above quoted statute as "thus in terms giving the lien authorized by Section 3019 (now Section 41-1726, Idaho Code Annotated) priority".

Moreover, in the Carlson-Lusk case it is said:

> "*Conceding for the purposes of this case the validity of the statute we have cited,* the question of the priority of the canal company's lien * * * depends on whether the North Side Canal Company, Limited, is actually controlled by the water users * * *. For the reason stated, it is unnecessary and would be futile to consider in this case the constitutional questions raised by the appellants as to the statutes we have cited". (Emphasis ours).

That the Supreme Court of the United States in the Portneuf case was clearly correct in construing Section 41-1910 as "thus in terms" giving the construction lien priority is demonstrable. Section 14-1901 and Section 41-1910 were both originally enacted in the year 1913 (Laws 1913, 464). The statute as originally enacted applied solely to Carey Act operating companies. In 1925 the law was extended to mutual co-operative irrigation companies generally (L. 1925, 154).

In expressly providing by the original enactment that the maintenance lien should not affect "any

other lien or *right of lien* given by the laws of the state *or otherwise*", the legislature naturally had in mind other liens pertaining peculiarly to Carey Act projects—namely, the construction liens—imposed by the combined sanction and authority of the federal Carey Act and the state legislation accepting it. Hence the Expression "given by the laws of this state or otherwise". The legislature intended to protect the priority of these construction liens. Any other intent on the part of the legislature would have approached dishonesty; and an interpretation of the statute ascribing to the legislature the intent to displace previously paramount Carey Act construction liens would render the legislation repugnant, we think, both to the federal Carey Act and to the federal and state constitutions.

While the federal Carey Act delegated to the state authority to *create* the Carey Act construction lien, the act of Congress expressely declared that

> "*such lien when created shall be valid on and and against the separate legal subdivisions of land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon*".

In other words, the validity of such lien after its creation is expressly asserted by the congressional act itself. Congress did more than merely authorize the state to create the construction lien. It attached to the lien certain mandatory provisions as to its nature after its creation. What did Congress mean

by using the term "shall be valid"? What is meant by the erm "valid" and what is a valid lien?

> "The term 'valid' means in law having legal strength, force and effect, or incapable of being rightfully overthrown or set aside".
>
> Emerson v. Knapp, 75 Mo. Appeals, 92, 97,
> U. S. v. McCutcheon, 234 U. S., 702.

> "To say that a mortgage shall be valid means, of course, valid as a mortgage; that is to say, a lien on specific property with the ordinary incidents of such lien, one of which is *priority* as to that particular property over all other debts of the mortgagor *which have not prior to that time ripened into a lien*". (Emphasis ours).
>
> King v. Fraser, 23 S. C., a page 567.
>
> "The word 'valid' means 'having legal strength or force * * * incapable of being rightfully overthrown or set aside".
>
> Edwards v. O'Neal (Tex.), 28 S. W. (2), 569, 572.

We believe, therefore, that Congress by its language expressed the intent that whatever lien for construction cost was created by the state legislature should thereafter have validity, force, and effect and be incapable of being nullified or impaired by the creation of other liens in favor of other private parties.

Therefore after a construction company has contracted with the state in view of such prior lien, and expended large sums of money in the construction of

irrigation works in reliance thereon, the legislature could not, even if it so desired, destroy the validity and priority which the act of Congress manifestly intended that these liens after their creation should thereafter possess. The construction of Section 14-1901 contended for by appellant would constitute that impairment of the obligations of a contract which is forbidden both by Section 10, Article 1 of the federal Constitution and also by Section 16, Article 1, of the Idaho Constitution, and would also impair vested rights.

> "A statutory lien cannot be given priority over a lien existing before the enactment of the statute creating it".
>
> 37 C. J., page 329, Sec. 41,
> 17 R. C. L., page 611, Sec. 21,
> Toledo, etc. v. Hamilton, 134 U. S., 269;
> 12 Am. Jur., page 354, Sec. 671, Title "Constitutional Law",
> Yeatman v. King, 51 N. W., 721,
> National Bank of Commerce v. Jones (Okla.), 91 Pac., 191,
> Baker v. Tulsa Building & Loan Ass'n. (Okla.), 66 Pac. (2d), at page 49,
> Barnitz v. Beverly, 163 U. S., 118; 41 L. Ed., 93.

We perhaps need pursue this aspect of the case no further. The United States Supreme Court in the Portneuf case has expressly declared that Section 41-1910, I. C. A., in express terms exempts Carey Act

construction liens from the priority claimed to be accorded to appellant's liens under Section 14-1901, I. C. A. There is certainly no contrary pronouncement by the Idaho Supreme Court, which has never construed Section 41-1910. Only in the event that this court should depart from the previous binding construction put upon the statute by the United States Supreme Court in the Portneuf case would it be necessary to consider the act of Congress and the constitutional provisions just above referred to. If the construction of the United States Supreme Court is followed, no conflict with the federal law or constitutional provisions could be claimed to exist.

Since Judge Cavanah's decision in this case, one of the cases involving appellant's 1932 maintenance liens has been tried in the state district court. It is very significant that the trial judge, after painstaking scrutiny of the state supreme court cases upon which appellant relies, has come to the conclusion that neither the Werner case nor the Carlson-Lusk case above discussed, nor any other state case, bears upon the main issue here presented for decision.

In an able opinion, Judge Guy Stevens, presiding in the District Court of Jerome County, Idaho, has just a few days ago, with all the arguments before him that have been set forth in appellant's brief here, come to conclusions in all respects identical with those announced by Judge Cavanah. We are setting forth as an appendix to this brief the full text of Judge Stevens' opinion. It will be observed that he not only follows the construction put by this court

and the Supreme Court of the United States in the Portneuf case upon the statutes and contracts governing this case, but he has concluded, after minute examination of the record in the Portneuf case, that the status of the parties, the status of the property involved, and the issues presented in the Portneuf case were identical with the case before him. Also on reason and principle he has thoroughly endorsed the conclusions of this court, the Supreme Court of the United States, and the decision of Judge Cavanah on all the controversies presented on this appeal.

Particularly devastating to appellant's contentions on this appeal is the following language from Juge Stevens' opinion:

> "Suppose that the Construction Company sold a water right to an Entryman and that Entryman failed to make the necessary improvements on the land for which the water right was sold, and therefore never acquired title to the land, and that the Construction Company, because of default by the purchaser, foreclosed its lien upon the water. Can it be said that the Construction Company could resell such water right in violation of the State contracts? I think not. The water right would then be subject to the lien of the trust deed, and the situation would be the same as if the water right had never been sold and would be exempt from assessments for maintenance and operation. The Construction Company would still be obliged to sell the water right to any other Entryman applying therefor.

I am of the opinion that where a Carey Act contract has been foreclosed because of default in the payment of the purchase price of the water, or where for that reason a deed has been executed conveying the property to the Construction Company, as was done in this case, that the water right and land is exempt from assessments for maintenance and operation the same as if the contract had never been made and the water stock issued. The stock was not subject to assessment before it was issued, and if in case of default, the Construction Company takes the necessary steps to preserve its security and thereby subjects the security to liens for assessments, operation, attachment, etc., then it would destroy the value of its security by undertaking to protect it. This, to my mind would be contrary to the clear intent and purpose of the Carey Act laws and contracts. When title to the lands and water rights involved was acquired by the Construction Company or its successor or assigns the trust deed was in existence, and was true when their assessments were levied by the Operating Company, and such lands and water rights were subject to the lien of the trust deed, and the lien of the bondholders who furnished the money for the construction of the project would be a prior and paramount lien to that of the Operating Company, even though they had a legal right to levy assessments for maintenance and operation under those circumstances.

When title to the land and water rights was acquired by foreclosure or by the acceptance of deeds the grantee acquired only a limited ownership and was still subject to the obligation of the state contract with respect thereto.

"Upon a consideration of the facts and record in the Portneuf-Marsh Case, I am convinced that the facts in the instant case are essentially the same, and that the decision in that case is controlling in this case. I have considered the questions of merger and estoppel raised by the plaintiff and they appear to me to be without merit."

III

COLLATERAL ISSUES

(A)—Appellee Is Not Estopped From Contesting Validity of Appellant's Assessments.

Appellant set up in its answer (fifth affirmative defense, R. 54-58) that appellee is estopped to deny the priority of appellant's maintenance liens. The court below found against this defense both on the facts and the law (Findings XX, R. 107; Op., R. 164). Appellant assigns the court's conclusions as error (Specifications 5, 7, and 12).

The alleged estoppel is based upon two grounds: First, that plaintiff or its agents paid maintenance assessments upon the properties up to and including the year 1931. Secondly, that Mr. R. E. Shepherd, an employee of the bondholders' committee and an officer of the construction company and of the investment company, *but who was at the same time*

general manager of the appellant canal company, assisted in preparing the budget of expenditures upon which the maintenance assessments here involved were made, and recommended and acquiesced in the expenditures which resulted in the alleged improvements of the irrigation system. We think no element of estoppel is present on either ground.

To constitute an estoppel on any basis, it must be shown that the party claiming the estoppel has been put in a disadvantageous position and acted to his disadvantage in a manner in which he would not have acted except for the other party's misleading statements or conduct. In the case at bar, there is not a single syllable of testimony in the record that defendant would have acted any differently than it did in any respect regarding the 1935-1937 assessments here in controversy if the circumstances alleged to constitute the estoppel had not occurred. No witness for defendant testified that the company made or refrained from making any expenditure or fixed the amount of the assessment differently than it would otherwise have done, in reliance upon any act or conduct of anybody connected with appellee. The trial court expressly found (R. 108) "that defendant did not by reason of any action of plaintiff alter its position to its disadvantage". There is no testimony in the record to controvert this finding, and appellant does not claim there is any. In these circumstances, there is no basis for estoppel.

> "In order to apply the principle of equitable estoppel it is essential that the party claiming to

have been influenced by the conduct or declarations of another to his injury was himself ignorant of the facts in question, and also without any convenient and available means of acquiring such knowledge. Where the facts are known to both parties or both have the same facilities for ascertaining the truth, there can be no estoppel".

Cahoon v. Seger, 31 Ida., 101;
Sullivan v. Mabey, 45 Ida., 595.

In Johansen v. Looney, 31 Ida., 754, the court laid down the following rule:

"The defense of estoppel is not available to a holder of title as against one contesting his right, where such title holder was at all times in possession of full knowledge of the nature of his title and the facts relating to the manner of its acquisition".

"Matters of equal knowledge between parties cannot become the basis of an equitable estoppel in favor of one against the other".

National Surety Company v. Craig, 220 Pac., 943.

"Estoppel may not be employed to secure advantage or to fortify gain, since its office is to protect from loss consequent on change of position in reliance on representation or other inducement".

Midwest Lumber Co. v. Brinkmeyer, 264 Pac., 17, 19.

In Brant v. Virginia Coal & Iron Company, 93 U. S., 326; 23 L. Ed., 927, it is said:

> "Where the condition of the title is known to both parties, or both hove the same means of ascertaining the truth, there can be no estoppel".

Appellant claims that the trial court erred in its finding that in all those respects in which R. E. Shepherd was acting in regard to estimates for assessments, recommendations for making improvements in the irrigation system, and like matters, concerning which appellant relies in its defense of estoppel, Mr. Shepherd was acting as an agent and officer of defendant and on its behalf and not as agent or officer or on behalf of plaintiff or the said bondholders or any of their said agencies (R. 108).

But the finding complained of is in almost the exact language of appellant's own witness, Harvey W. Hurlebaus, its secretary-treasurer, who stated:

> "As President and as General Manager of the *canal company* he (Mr. Shepherd) attended regular meetings of the board of directors and the regular annual meetings of the stockholders of the company, as well as any special meetings which were called from time to time. *As general manager of the Canal Company* Mr. Shepherd made recommendations to the directors and to the stockholders concerning the improvement of the system" (R. 225).

It could hardly have been otherwise. Naturally,

as general manager of appellant company, it was within the scope of Mr. Shepherd's duties to participate in the esimate of the amount of money that would be required to operate defendant's system, to make up its budgets, and to be present at the meetings at which the amount of the annual assessments were discussed and the assessments levied. He had not been since 1920 (R. 243) a member of the board of directors of the appellant company; and its board if directors presumably made the actual levy of assessments here involved—if any such assessments were ever legally levied.

It is true that Mr. Shepherd was while acting as general manager of appellant company at the same time an employee of the bondholders' committee and also manager of the Land and Water Company and of the Investment Company prior to their merger. In these circumstances, the law does not imply any authority on the part of an officer to waive any rights of either corporation. As stated in 14-A C. J., 365:

> "But one corporation is not liable for the acts of such officers done in the discharge of their duties toward the other corporation."

Appellant could not safely do otherwise than spread the assessments ratably over all the lands of the project and take every step necessary to protect its rights until the controverted question of appellee's liability was ultimately determined. Moreover, if at any time tracts of appellee's repossessed land were sold to other settlers who thereupon be-

gan using water, they would immediately again become subject to maintenance charges. In these circumstances, quite obviously tracts of appellee's repossessed properties which at the time the assessment was levied were not subject to assessment might become again subject to assessment (to the extent of the new settlers' interest) during the year for which the assessment was made. The fact that Mr. Shepherd, serving in a dual capacity as an employee of both companies did nothing to waive any right of appellant, certainly should not be advanced as an argument that he thereby waived any rights of appellee.

If Mr. Shepherd, serving in the dual capacity, had vehemently asserted that the assessments were invalid as against appellee's property, it would not have been binding upon appellant's legal right here. The law would not be able to determine in behalf of whose interests Mr. Shepherd might be speaking. Conversely, in the same circumstances, even if Mr. Shepherd were shown by the evidence to have taken the position that appellee's lands *were* liable for the assessments, the law would not be able to determine that his position was not dictated by his interest as general manager of the appellant company. There is no testimony in the record that Mr. Shepherd or anyone else on behalf of plaintiff ever promised or agreed to pay the controverted assessments, or any of them; or, on the other hand, that he asserted their illegality. He took no position in the matter. Mr. Shepherd acted with exemplary propriety while act-

ing in such dual capacity, and nothing he did or omitted to do affords any basis of estoppel for either.

The assessments here in controversy are those for the years 1935-1937, inclusive. The evidence discloses that appellee had paid no assessments on any of its lands since the year 1931. Any action taken by appellant with respect to the assessments here involved must inevitably have been taken in the light of the clear knowledge that for a period of at least three to five years, appellee had been consistently declining to pay any assessments upon any of its property. In these circumstances, it can hardly be claimed by appellant that with respect to the assessments here involved or with respect to any expenditures of money derived from said assessments it was in any manner misled or projudiced.

It is claimed by appellant that by the payment of certain maintenance assessments upon appellee's lands up to the year 1931, it has waived its legal rights to contest here the priority of the maintenance assessments involved. The law is clearly to the contrary.

> The essence of waiver is estoppel, and when there is no estoppel there is no waiver.
>
> 67 C. J., page 294;
> Globe Mutual Life Ins. Co. v. Wolff, 95 U. S., 326; 24 L. Ed., 387, at page 389;
> Williams v. Neeley (CCA 8th), 134 Fed. 1.

In Hawkins v. Smith, 35 Ida., 349, the court, in discussing waiver (p. 353), and after declaring that

it is the voluntary abandonment or relinquishment by a party of some right or advantage, said:

> "But in such a case it must appear that the adversary party has acted in reliance upon such waiver and altered his position so that he will be prejudiced."

In Gibson v. Iowa Legion of Honor (Ia.), 159 N. W., 639, it is stated in Section 21 of the syllabus:

> "A waiver, created by payment of illegal assessments, cannot estop the assured from refusing to continue to pay the illegal exactions".

In the opinion at page 645, the court uses the following language:

> "And if it were true payments were made which could not legally be exacted, the waiver thus created, if any, cannot operate to estop one from refusing to continue to pay such illegal exactions".

In O'Malley v. Wagner (Ky.), 76 S. W., 356, it is stated in the syllabus:

> "A mere payment by one of part of the debt for which he is not legally bound, in not prejudicing anyone, does not estop him to deny liability for the balance".

In the body of the case, the court said:

> "We do not understand that, because a person pays a part of a debt for which he is not legally

bound, he thereby becomes bound to pay the balance".

In Juett v. Cincinnati Railroad Company (Ky.), 53 S. W. (2d), 551, the court said:

"One is not estopped to deny liability by having made payments not legally due".

To the same effect:

Williams v. Harrison (Ind.), 123 N. E. 245;
Quaschneck v. Blodgett, 156 N. W., 216.

"A waiver, like a gift, can only operate in praesenti. When intended to operate it futuro, it is at most only an agreement to waive, which, it would seem, must, like all other agreements have a consideration".

Gardner v. Clark, 21 N. Y., 399.

The above language was quoted with approval in Johnson v. Nevada Packard Mines Company, 272 Fed., 291, at page 305.

Also to substantially the same effect is Walsh v. Howard & Childs, 113 N. Y. Supp., 499, 502.

Rice v. Fidelity & Deposit Company (C. C. A. 8th), 103 Fed., 427, 435.

In appellant's brief (page 70), quotation is made from 21 C. J., Section 221, page 1216, concerning "Acquiescence". The following section (No. 222) of the same work, page 1217, points out the *true qualification* of the rule set out in appellant's quotation:

"It is also essential that the party claiming

> the estoppel should be misled by the acquiescence of the party against whom the estoppel is claimed, that he should be entitled to rely thereon, and that he should be induced to change his position by reason thereof; and the acts of acquiescence must be such as to prejudice the party claiming the estoppel".

As stated above, there is not a syllable of evidence in the record here to contradict the trial court's finding and conclusion to the effect that appellant neither relied upon nor was injured by any alleged acts or conduct of appellee in the way of waiver or acquiescence.

The circumstances under which any of the payments of assessment were made prior to 1931 are in no manner elucidated. Since the primary function of appellee is the sale of its repossessed water rights, in order to be reimbursed for its construction costs, it is almost a necessary inference that such payments as it made were required to clear its titles in order that resales to settlers might be accomplished; but the mere submission to illegal exactions in the circumstances in which appellee was put should by no means compel it to submit indefinitely to such illegal exactions.

(B)—The Trial Court Properly Rejected Appellant's Evidence of Its Subsequent Suits Filed in the State Courts to Enforce Its Maintenance Liens Here Involved.

At the trial, Exhibits 33 and 34 were offered in evidence; these were the complaints in the fore-

closure suits filed in the state court after this suit was begun. The court refused to admit the exhibits over appellee's objection (R. 219) and on motion of appellee also struck that portion of Witness Barclay's testimony to the effect that similar suits had been commenced in Gooding County (R. 216, 217). The court also concluded that appellant's alleged maintenance lien for 1935 no longer binds any of appellee's property (R. 110, R. 134). Appellant assigns error with respect to these rulings (Specification of Errors IX, XIV-B, and XVI). The basis of the trial court's conclusions on these points are as follows:

This suit brought before the federal court below for adjudication the relative dignity or priority of appellant's maintenance liens for the years 1935, 1936, and 1937 upon the property here involved as against appellee's claim of lien thereon. After this suit was begun, appellant brought four suits in the state courts to foreclose the *identical* maintenance liens here involved. These state court suits admittedly presented for determination precisely the same issues with respect to the same property, and necessarily involved an unavoidable and intolerable conflict of jurisdiction.

Section 41-1905, I. C. A., relating to appellant's maintenance liens provides as follows:

> "No lien provided for in this chapter binds any land for a longer period than two years after the filing of the statement mentioned in Section 41-1903 unless proceedings be commenced in a

proper court within that time to enforce such lien".

The question involved in the court's rulings which appellant assigns as error is whether or not, after the federal court below had obtained exclusive jurisdiction to adjudicate and determine in this suit the validity of appellant's specific maintenance liens, any other court than the court whose prior jurisdiction was invoked was a "proper court" within the meaning of the above statute, in which to foreclose appellant's identical liens involved in this suit. If in the situation presented at the trial of this case the other courts were not "the proper courts" in which to foreclose such liens, then admittedly the 1935 maintenance lien no longer was binding upon appellee's land in any respect. The 1935 lien statement or claim of lien was filed December 30, 1935 (R. 99). Therefore, by the terms of the statute the time for foreclosing it in "a proper court" expired December 30, 1937. Admittedly, the only such suits so begun were those improperly (as we think) begun in the state courts of Gooding and Jerome Counties on December 24, 1937. Exhibits 33 and 34 were proferred as evidence that as required by the statute appellant had taken the proper steps to preserve its liens.

Objection was made by appellee to the introduction of evidence of the commencement of these suits, in part because a month after the filing of this suit,

"and after the records and files disclosed that appearance was made, a suit was begun in an-

other court to foreclosure these liens, and it is our theory that after this court obtained jurisdiction of the subject matters of these liens, no other court was a 'proper court' to begin action for the foreclosure of the liens" (R. 218).

Since the trial court sustained the objection, it must be assumed, in the absence of anything to the contrary in the record before this court, that the files of the lower court disclosed that the suits in the state court were begun as stated after the actual appearance of appellant in the federal court below. The question is thus squarely presented whether in these circumstances these state court suits were, in accordance with the Idaho statute set out above "proper courts" in which to enforce appellant's liens in controversy here. It is appellee's view, sustained by the federal trial court, that when once that court acquired exclusive jurisdiction by this suit to quiet title to determine the validity of appellant's liens, such court alone was the only "proper court" before which the appellant could enforce any of those liens by suit of foreclosure. Otherwise, a conflict of jurisdiction would arise, incompatible with the dignity and decorum of any judicial procedure.

Appellant could not, after its appearance in the federal court below, defy and avoid the jurisdiction of that court and create a multiplicity of suits involving the same issues and the same property. It should not be permitted to take advantage of its own improper act and enjoy the preservation of a lien which admittedly had expired by limitation, except

for the improper filing of the state court suits.

This is an action in rem. It involves conflicting claims to real property, involving precisely the same liens and the same property as the foreclosure suits later brought in the state courts. Appellee's suit here invoked the jurisdiction of the court below to declare appellant's maintenance liens *for the years in question invalid.* Appellant's suits for foreclosure subsequently invoked the jurisdiction of other courts to declare the same identical liens *valid* and to *enforce and foreclose* them. Here is presented an unavoidable and head-on collision. While the federal court is clearing the title of property from a lien another court cannot be permitted to enforce the same lien.

Beyond question, if appellee had had advance notice of appellant's purpose to begin these later state court suits, their commencement would have been enjoined upon its application. The only ground upon which their commencement would have been enjoined was because in the special circumstances the state courts were not the "proper courts" in which to foreclose the liens. It follows inevitably that if in the circumstances the commencement of these suits was wrongful, and subject to injunction as creating a multiplicity of suits and a conflict of jurisdiction, the appellant should not be permitted to take advantage of such wrongful act as a step lawful in the preservation of its lien.

By sustaining appellee's objection to the introduction of the evidence, the federal court below merely protected and vindicated its own jurisdiction. Under

the authorities, it could not stultify itself by ruling, when the question was presented to it, that in the circumstances here presented the state courts were at the time the suits were filed in any sense the proper courts in which appellant might foreclose its liens.

In the case of Covell v. Heyman, 111 U. S., 176, 28 L. Ed., 390, 393, the United States Supreme Court said:

> "The forebearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided * * * is a principle of comity with perhaps no higher sanction than the utility which comes from concord; *but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience * * * and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty*". (Emphasis ours).

The cases are numerous to the same effect. They apply solely to *inevitable conflicts of jurisdiction* where the same parties, the same issues, and the same property are involved.

Appellant argues that the district courts of Idaho are courts of general jurisdiction under the Idaho

constitution and statutes and, therefore, its subsequent foreclosure suits in the state courts were justified and proper. We think the argument is wholly fallacious. Very probably the district courts of California are courts of general jurisdiction; but could it be claimed that under the language of Section 41-1905, I. C. A., a suit by appellant in a district court of California to foreclose its liens would have been brought in "a proper court" within the meaning of that statute?. By the language of the statute it was not sufficient merely to bring a foreclosure suit. The suits to foreclose the 1935, 1936 and 1937 liens had to be brought in a "proper court"; and after the federal court below obtained jurisdiction of the parties, of the subject matter, and of the property, its jurisdiction became exclusive and it alone was the proper court in which appellant might foreclose those particular liens.

It was not requisite that appellee, to protect the prior jurisdiction of the federal trial court should be put to the expense of employing counsel to enjoin the commencement or prosecution of the subsequent suits in the state court. Any action by the federal trial court designed to prevent appellant profiting by its course in attempting to create a conflict of jurisdiction and a multiplicity of suits was proper in the preservation of its jurisdiction.

The trial court's ruling in rejecting the proferred evidence, however, is an immaterial matter. If the rejected evidence had been admitted, the court's conclusion as to the legal effect of the suits improperly

begun would of necessity have been the same as if no evidence had been introduced. Moreover, it is wholly unnecessary for this court to consider any aspect of the questions discussed under this heading if its conclusion on the fundamental question involved in this suit is the same as that reached by the trial court. If appellant's maintenance liens are subordinate to appellee's claims to the property here involved, then whatever steps may have been taken by appellant in the recording or preservation of its liens become immaterial.

Before leaving this subject, it should be remarked that a wholly different question is here involved than that heretofore discussed in connection with appellant's "plea in abatement". The court below declined to abate this suit because it involved a *wholly different controversy and cause of action* than any cause of action involved in the prior state court suits; and in the trial of this suit it rejected as evidence appellant's Exhibits 33 and 34 because the *later* suits brought in the state court involved *the identical controversy and cause of action* embraced in this suit. After the beginning of this suit, only one court was in any reasonable sense or construction "the proper court" in which (while this cause is pending) the appellant might foreclose the identical liens here involved. It could and should, if limitations of time required their foreclosure, have sought such foreclosure by appropriate cross-complaint in the trial court below.

(C)—Alleged "Offset" Against Statutory Assessments.

On page 78 of appellant's brief occurs a discussion (not found in the "Summary of Argument") of its specification of errors Nos. 8 and 15.

Those specifications of error and the discussion of them wholly distort appellee's position and the theory of the trial court in making the findings and the rulings on evidence of which appellant complains.

No one has ever asserted that there is authority in law for permitting a water user to offset *statutory assessments* for maintenance and operation by showing that he did not use his water and that this resulted in an advantage to other stockholders. If appellant's maintenance assessments here involved are valid as *statutory assessments as against the prior construction lien of appellee*, then appellee cannot claim nor should it claim an offset against the assessments by reason of the fact that it did not use the water during the years in question.

But that is not at all the point involved in the court's rulings. Appellant in its third affirmative defense (R. 52) claimed an *equitable* lien against appellee's property because, as it alleged, a very substantial portion of the moneys collected by virtue of the assessments in question had been expended in the improvement and betterment of the irrigation system and (R. 54) "in equity and good conscience plaintiff herein and its land and water rights * * * should be required to pay their equal and ratable proportion" of the expense incident to such maintenance and improvement. A large part of the testimony of-

fered by appellant had to do with these alleged improvements and betterments.

In these circumstances, it was necessary for the trial court to consider the *equities* between the parties and the evidence disclosed the following facts: That appellee never at any time used any irrigation water upon any of its lands involved in this suit subsequent to the time they came back into its possession after the uncompleted sales to settlers', and that the water so unused upon the lands of appellee but represented by the appurtenant water stock went to the benefit of the stockholders on the project who were farming and irrigating their lands. It also appeared that there were certain years which were "dry years" when the appellant canal company to save the crops was supplementing its water supply by leasing and purchasing additional water. In such years, the benefits to the other stockholders from the non-use of water appurtenant to the repossessed lands to appellee while dormant and waiting resale to other settlers were, of course, very apparent.

Not only was this true with respect to the water represented *by the stock in the appellant company* apppurtenant to appellee's said lands, but these same lands of appellee, by reason of their inclusion in the American Falls Irrigation District, had appurtenant to them *an additional and wholly independent water right* not represented by stock of the appellant company and in which the appellant canal company and its other stockholders had no interest whatsoever (R.

241, 270). This independent water right "amounted to 1.13 acre fee per acre, increased by 50% if the reservoir was filled" (R. 241); in other words, 1.70 acre feet per acre (R. 269). The settler stockholders of the appellant company, other than appellee, got the benefit of all this water.

It is easily apparent, moreover, that the principal expenses paid out of the moneys collected for maintenance is related to the actual distribution of water among consumers; that is, the salaries of ditch riders. Since the annual assessments of the appellant company have ranged from $1.00 to $1.50 per year (R. 227), its collections over a period of ten years must have approximated $2,000,000.00, and of this amount the utmost claims of appellant are that over a period beginning in 1928 and up to the present time it has incurred expense not exceeding $480,000.00 in betterments and improvements to the irrigation system as distinguished from water distribution expense. Thus, approximately 75% of the maintenance moneys have been paid out for expenses connected with the actual distribution of water among consumers. Appellee's land received no part of this distribution. It appears from the evidence that up to and including the year 1931 appellee has paid assessments of about $100,000.00 (R. 241) upon its lands, for which it was not legally liable. Appellee's lands constitute approximately one-seventeenth of the entire project (R. 242). Its full equitable share of all possible improvements to the system made by appellant could in no event, therefore, exceed $30,-

000.00. It is thus apparent that, viewed from any *equitable* standpoint, appellee's lands have borne more than three times their full equitable share of any betterments and improvements to the irrigation system shown at any time to have been made by appellant; and that all this was during a time when the lands of other stockholders were receiving not only the benefit of all the water represented by appellee's repossessed and still unsold water stock, but also an independent water supply (American Falls Irrigation District) from these same lands of appellee amounting to around 19,000 acre feet a year.

These were the considerations which impelled the trial court to receive the evidence and reach the conclusions it did concerning the non-use of water on appellee's property and the use of the same water upon the lands of appellant's settler-stockholders. The whole bearing of the matter was upon appellant's alleged *equitable lien.*

The admission of evidence that appellant used the water appurtenant to appellee's lands here involved upon the lands of its other stockholders was received on the above theory and not at all, as stated by appellant, on the theory that an offset against lawful *statutory assessments* could or was being claimed by appellee by reason of its non-use of water.

Evidence of the use of water by appellant upon the lands of its other stockholders was, of course, also wholly and highly relevant in negativing the additional defense made by appellant that appellee through non-use of the water had abandoned and for-

feited the water rights appurtenant to its lands. (Court's opinion R. 165). And the courts finding as to such use (R. 109) is conclusive on the issue of abandonment as hereinafter shown.

(D)—The Court Did Not Err in Holding That There Was No Evidence Showing the Amount Expended in Improvements and Betterments of the Irrigation System During the Years Here Involved.

The court found (R. 105) that certain improvements had been made in the irrigation system, extending over a period of approximately ten years but that: "No evidence appears showing the amount of such improvements done in the aggregate during the three-year period (1935-1937, inclusive) involved in this suit".

Appellant assigns this as error and discusses the matter briefly on page 80 of its brief.

The controversy here, as frequently stated, involves assessments for the years 1935 to 1937, inclusive.

At the beginning of appellant's testimony, the trial court inquired:

> "The Court: Then so far as we are concerned, the levies are for 1935, 1936 and 1937?
>
> "Mr. Stephan: That is correct" (R. 213).

Since appellant admits that it is foreclosing in the state courts its alleged *statutory liens* for maintenance for the years 1932, 1933, and 1934, it is reasonably obvious that it cannot at the same time claim in this court in this suit *equitable liens* for the same years. Moreover, as shown above, its counsel by his

above quoted answer to the court's question and in accordance with the stipulation and agreement alleged in its answer (R. 50) eliminated any controversy relating to the validity of appellant's maintenance liens for the years 1932, 1933, and 1934.

Appellant, nevertheless, in support of its alleged equitable lien pleaded in its answer, offered evidence and was permitted to introduce it, as to expenditures made in the aggregate for the improvement and betterment of the irrigation system over a long period beginning with the years 1927 and 1928, when an interest in "what is known as the Gooding Canal, together with A Siphon and B Siphon", was acquired (R. 226). The witness Delbert Henderson (R. 220) testified as to betterments on certain laterals since the year 1931. There was no attempt at segregation of the expenditures made for betterments and improvements during the years 1935 to 1937, inclusive, as distinguished from the aggregate of the improvements made during all the years from 1927 and 1928 and onward.

The court's finding above quoted and of which appellant complains was based upon this situation. The finding is fully justified by the state of the record and the agreed limitation of the issues involved in this suit. Appellant does not seriously attempt to discuss the real question. If the court had found in favor of defendant upon its claim for an equitable lien upon appellee's property for its fair and just share of any improvements or betterments made upon the system for the years 1935 to 1937, inclu-

sive (the years involved in this suit) it would have been wholly unable to determine the amount of such lien.

In view of the fact that the Supreme Court of the United States in the Portneuf case fully disposed of the equitable lien theory of appellant, and in view of the trial court's conclusion (R. bottom page 167) that "it would be stretching the imagination to say that under the evidence the equities are in favor of the defendant", it would seem that the matter here discussed is immaterial.

Appellant does not urge in its brief its theory of an equitable lien; but apparently relies here on the priority of its statutory liens. The trial court's conclusion with respect to any alleged equitable lien claimed by appellant would seem to be a matter of balancing and weighing the evidence concerning the respective equities of the parties, and thus particularly a matter within the province of the trial court, the conclusions of which would not be disturbed except for palpable injustice. It is perhaps these considerations which have led appellant not to urge in this court its claim of an equitable lien. The trial court's conclusion here discussed, to the effect that the evidence is insufficient to enable it to determine the expenditures in the improvement of the system made by appellant during the years 1935 to 1937, inclusive, here involved, could only be pertinent in any respect if appellant were entitled to an equitable lien for improvements made to the system during the years here in question.

(E)—Appellee's Right to Water Has Not Been Lost by Non-user.

Appellant assigns as error (Specification No. 6) the court's conclusion (VIII, R. 113) that the water rights appurtenant to appellee's lands here involved had not been abandoned or forfeited by non-user.

It is admitted by appellant and expressly found as a fact by the court (R. 105) that the lands in controversy herein were not irrigated and received no water from the system during any of the years since the date of their acquisition through foreclosure or quitclaim deed. But it is also found (R. 109) that the appellant and its stockholders (other than appellee) have during those years continuously used this water upon the lands of the project belonging to such other stockholders. It is elementary that use of water on lands other than the lands to which the same is appurtenant does not create an abandonment or forfeiture of a water right.

Mahoney v. Nieswanger, 6 Ida., 750; 59 Pac. 561;

Joyce v. Rubin, 23 Ida., 296; 130 Pac. 793;

Joyce v. Murphy Land Co., 35 Ida., 549; 208 Pac., 241;

In re Department of Reclamation, 50 Ida., 573, 579.

Moreover, the state contract itself (Exhibit 1, R. 182) provides that the water rights appropriated were "taken for the benefit of the entire tract of land to be irrigated from the system". Appellant itself is the legal owner of all the water rights represented

by its shares of stock, the holders of the stock certificates being the equitable or beneficial owners of the right to the use of the water represented thereby. The relation of the appellant company to all of its stockholders (including appellee) is of a fiduciary nature; the appellant company cannot urge that the water rights in question which it has itself been continuously using for the benefit of its other stockholders have been forfeited or abandoned. Moreover, all the stockholders of appellant corporation are tenants in common in the use of the water rights and the use of water by one tenant in common is deemed to be the use of all.

In the case of Washington County Irrigation District v. Talboy, 55 Ida., 382, the court said (page 393):

> "The contention that appellant had abandoned its water right is not tenable. That the water right itself had not been abandoned is demonstrated by the fact that the water was actually diverted from the natural stream and impounded in the reservoir each year, and no other appropriator was contesting the right of the reservoir owners to divert and impound the water, and we have no controversy here between prior and subsequent appropriators".
>
> "The law presumes that the possession of one cotenant is the possession of all the cotenants, and no presumption of abandonment arises in such cases".

The trial court in its opinion (R. 165, 166) mentioned only a few of the very numerous authorities supporting all the foregoing propositions. Appellant makes no serious attempt to controvert the court's conclusions or the legion of authorities that might be adduced to support them.

Without taking space to quote here from the opinion of Judge Cavanah on this point, we respectfully direct to it the attention of this reviewing court (R. 165, 166).

(F)—Exhibits 38 and 39, Showing a Legal Opinion of E. A. Walters, Were Inadmissible as Evidence.

Appellant assigns as error (Specification No. 17) and discusses in its brief (page 82) the court's action in rejecting as evidence Exhibits 38 and 39 (R. 238-240).

Exhibit No. 38 is a letter (R. 238) addressed by Mr. Hurlebaus, as secretary of the appellant company, to Walters & Parry, Attorneys at Law, Twin Falls, Idaho, asking legal advice. It appears that Walters & Parry were acting as attorneys for the Land & Water Company during the year 1925 (R. 237), that being the year when the inquiry was made. It also appears that that firm of attorneys or a somewhat similar firm of attorneys at various times acted also as attorneys for the appellant company (R. 214). The tenor of Mr. Hurlebaus' letter asking for advice (Ex. 38; R. 238) highly resembles a letter of inquiry by a client to his own attorney.

Exhibit No. 39 is the reply of Mr. Walters to the

request of the secretary of appellant company "for advice".

Mr. Walters in his reply expresses a purely legal opinion. The opinion does not have at all the scope claimed for it by appellant. By clear inference, it expresses the opinion that after foreclosure of the settlers' water contracts and so long as the Land & Water Company or the trustee for the bondholders retained title to the property it was exempt from assessment. But he also expresses the opinion that when the title to the property passed to the subsidiary investment company, its status was changed and it then became subject to maintenance assessments, as if in the hands of a private party.

Assuming that Mr. Walters was acting as attorney for the construction company during the year 1925, the scope of his employment is nowhere shown; and even if it were shown that Mr. Walters or his firm had been employed to investigate the particular point of law expressed in his opinion, we think that evidence of such opinion would be wholly inadmissible on elementary principles. The question here is not what any attorney may have thought the law was at any time, but what the court, in the light of all the facts adduced in evidence, concludes the law actually is. Mr. Walters' letter was written either at a time when the Portneuf case was pending before this court or very shortly after the opinion was released. While the opinion of this court reversing the trial court is dated May 25, 1925, a petition for rehearing was filed soon thereafter and briefs sub-

mitted on both sides before the petition for rehearing was denied and the opinion finally released. The Portneuf case had not been finally adjudicated and the law was then uncertain. Indeed, appellant insists that the law is still uncertain. Especially in these circumstances, the opinion of any particular attorney at that time, whether correct or incorrect, is wholly irrelevant as evidence.

The undisputed facts as disclosed by the evidence here is that the investment company ever since 1913, when the bondholders took over the affairs of the project, has been a wholly owned subsidiary of the construction company, used solely and entirely as an agency and instrumentality for holding and reselling the properties repossessed through foreclosure of the Carey Act construction liens. Mr. Walters was either misinformed as to the facts or in error in his opinion of the law. The letter is no more admissible in evidence that would be the opinion of any one of the various counsel involved in this suit with respect to any particular point of law involved.

IV

GENERAL COMMENTS ON PORTIONS OF APPELLANT'S BRIEF

(A)—Province of State and Federal Courts in This Case.

Appellant's statement on page 22 of its brief that a decision in favor of appellee in a state court would be more conclusive, broader, and more far-reaching than a decision in the case at bar, and the further statement (page 38) that the decision of the federal

courts "would only settle the question as to the particular landowner who is a party to the suit" are equally erroneous. There is no other landowner on this project who is in the status of appellee. There was only one construction company on the project and only one trust deed. No other landowner could possibly be in the status of appellee. Moreover, the decision of the questions here involved embrace considerations affecting the intent of Congress in passing the original Carey Act; and the construction of Sec. 41-1901 I. C. A. urged by appellant would involve a conflict with the Federal Constitution. All the state statutes which must be construed are but the offspring of the federal Carey Act law which authorized and set forth the scheme of reclamation of desert land set out therein.

(B)—"Exemption" of Appellee's Property from Assessments.

On page 48 of appellant's brief, it complains of the ruling of the trial court to the effect that the property of appellee here is "exempt from assessment". As will be observed from the terms of the court's opinion, findings, and decree herein, the exemption granted is a limited and qualified exemption. The property is made exempt from assessment only to the extent that appellee is permitted to obtain its authorized construction costs for the project out of the property before being deprived of this privilege by intervening maintenance assessments; the trial court's decree holds the construction company and its bondholders to their original status as trus-

tees, a vehicle for placing the reclaimed lands in the hands of actual settlers, as indubitably contemplated by the act of Congress. The qualified exemption from assessment decreed by the trial court prevents the construction company or its bondholders from monopolizing and profiting from the reclaimed land. It lays upon appellee the obligation to resell the land whenever it can obtain therefrom reimbursement for the construction costs. While preventing the appellee from profiting from this Carey Act enterprise, at the same time the decree permits it, so far as possible, to be reimbursed for its outlays and expenditures. Beginning at the bottom of page 63 of appellant's brief begins a statement that expresses appellee's position exactly:

> "Appellee merely had a franchise from the state for the construction of irrigation works; and for the cost of constructing the works it was permitted to collect from the settlers the amounts specified in the state contracts."

The same viewpoint has been repeatedly expressed by the Supreme Court of Idaho in such language as the following:

> "The construction company's interest in the reservoirs, dams, water rights, etc., is represented by the lien provided by law to cover the cost of construction".
>
> Idaho Irrigation Co. v. Lincoln Co., 28 Ida., 97.

Appellant's brief (page 64) contains fairly com-

prehensive citation of various other opinions of the Supreme Court of Idaho, expressing the same view. Indeed, under the theory of the federal Carey Act no other view could be entertained.

(C)—Exemption from Assessments Not by Implication

On page 49 of appellant's brief, it is stated that "an intention on the part of the legislature to grant an exemption from assessments" must be expressed in clear terms and that "exemptions are never presumed". As applied generally to taxes and assessments of municipal and public corporations, the foregoing statement may be true. But the controversy here is purely between private interests. It is a controversy between the settlers who have bought water rights on the project, on the one hand, and the construction company and its bondholders on the other. The appellant company in this case really represents the landowners who are irrigating and farming the lands.

And in this case, the exemption from assessment is not by implication. Just as in the Portneuf case, it is fairly clearly expressed by the governing contracts and by-laws interpreted in the light of the statutes which were incorporated in them.

We have elsewhere in this brief attempted to point out the precise identity between the issues determined in the Portneuf case and this present case. There are still one or two points of almost precise similarity that we have omitted to emphasize. One point is the identity between the by-laws of the oper-

ating company in the Portneuf case and by-laws of the appellant company here. The by-law of the operating company in the Portneuf case as set out in this court's opinion in that case is quoted as follows on page 87 of appellant's brief:

> "All shares of this corporation shall be held subject to the rights of the Portneuf-Marsh Valley Irrigation Company, Limited, until the amount due to such company, its successors or assigns, shall have been fully and finally paid, as provided in the contract between said corporation and the purchasers of shares, and as provided in the contract between the said Portneuf-Marsh Valley Irrigation Company, Limited, and the State of Idaho".

For purposes of comparison, we quote as follows from Article 10, Section 5, of the by-laws of appellant company here (R. 190):

> "All the stock of this corporation shall be issued to and held by the Twin Falls North Side Land and Water Company, its successors or assigns, in order to enable it to deliver shares of stock to purchasers of water rights, but said shares of stock shall have no voting power and shall not have force and effect and shall not be assessable for any purpose either for maintenance or otherwise, until they have been sold or contracted to be sold to entrymen or owners of land under the irrigation system, and all assessments, maintenance and other charges must be

> paid by the purchaser or owner of the stock and not by the Twin Falls North Side Land and Water Company, its successors or assigns".

We submit that the purpose and intent of the two by-laws, in the light of the governing statutes, are identical.

Also on page 87 of appellant's brief attention is called to the language of the Supreme Court of the United States in the Portneuf case (page 639 of the official report, p. 1270, 71 L. Ed.) where it is stated that "The *contract between the two companies* was to the same effect". This means, of course, to the same effect as the Portneuf operating company's by-law as above quoted; and appellant's brief further states (page 87):

> "There is no such contract between appellee and appellant".

Again by reference to the printed record in the Portneuf case it will be found (Portneuf R. 264) that the contract between the two companies in that respect was in the precise terms of the above quoted by-law of the operating company in the Portneuf case; and further that the contract provided that such by-law should be irrepealable without the consent of the construction company (Portneuf R. 265).

But we think that the by-law of the operating company here, which exists at the present time unrepealed, is just as effective as a contract between the parties to this litigation as if it were embodied in a

formal instrument signed by each. It embodies the conditions under which the stock of appellant company was issued and is held. In the light of the governing federal and state statutes and the state contract under which the rights of both parties as they exist originally attached, any repeal or disregard of the provisions of this by-law, would be in breach of appellee's rights. So again, appellant in vain seeks a distinction between the Portneuf case and this case based upon any real difference between the by-laws and contracts involved.

(D)—The Bearing of Section 41-806, Idaho Code Annotated.

On page 62 of appellant's brief, attention is called to Section 41-806, Idaho Code Annotated, and that statute, together with the decisions of the Idaho Supreme Court there cited, is said to evidence an established public policy in the State of Idaho for upwards of forty-four years that an irrigation company shall have a prior lien on land for water service.

Again on page 88 of appellant's brief the same section 41-806, I. C. A., (formerly Section 5631 of the Compiled Statutes), is again referred to with the statement that the Supreme Court of the United States in the Portneuf case stated that statute was not applicable to the case. It is equally *inapplicable here*, for many reasons. A portion of the statute is quoted in the appendix to appellant's brief (p. ii). The first sentence reads as follows:

> "The amount to be paid by said party or parties for the delivery of said water, which

amount may be fixed by contract, or may be as provided by law, is a first lien upon the land for the irrigation of which said water is *furnished and delivered*".

One of the obvious reasons why the statute is not applicable here is because admittedly no water has ever been either *furnished* or *delivered* to appellee's lands.

But the inapplicability of the statute goes even much further. An analysis of its history and context shows beyond dispute that the intent of the legislature in passing it was to afford a construction company selling or renting water rights *a paramount lien upon the land* for the *purchase price* of *such* water. And section 41-806 alone, independent of the special Carey Act statute, would be sufficient to support *appellee's* claim in this case instead of appellants.

The records of this court in the Portneuf case will show that after the original opinion was filed the Portneuf operating company filed a petition for rehearing. The ground of the petition for rehearing was the statement that this same Section 41-806 I. C. A. (then Section 5631 Compiled Statutes) had not previously been called to the attention either of the trial court or this court; and that such section rightly construed supported the operating company's contention. The same thing is now urged here. This court then required both parties to submit briefs on

this identical point in order to determine whether a rehearing should be granted. In the brief of Brown & Chapin, Trustees (then appellants in this court) will be found a full analysis of the entire legislative act of which Section 41-806 I. C. A. is a part, and in the appendix of the brief, the legislative act (passed in 1895) is set out in full. The Portneuf operating company filed a reply brief in support of its petition for rehearing. The rehearing was then denied by this court.

We assert with some confidence that the appellant's brief in the Portneuf case upon the question of whether a rehearing should be granted, filed in this court upon the court's request, conclusively demonstrates that the lien referred to in Section 41-806, I. C. A. (then Section 5631) was intended to be and is a lien for the *purchase price or rental consideration for water furnished by a construction company and not a lien for maintenance and operation.* If the matter is considered material by this court, we trust that those briefs on the matter of granting rehearing in the Portneuf case will be read and considered by this court in determining the scope of its decision in the Portneuf case.

In conclusion we respectfully submit that on the fundamental questions here involved, the decision of this court and the Supreme Court of the United States in the Portneuf case is wholly controlling; that those decisions and the conclusions of the trial court below in harmony therewith, announce sound

and just principles, grounded upon the intent of the federal Carey Act and the state legislation accepting its provisions; likewise that the rulings of the trial court upon the collateral issues involved are supported by sound reasons and ample authority, and that the decree should be in all respects affirmed.

Respectfully submitted,

EDWIN SNOW,

Residence: Boise, Idaho,

A. F. JAMES,

Residence: Gooding, Idaho,

Attorneys for Appellee,

Idaho Farms Company.

APPENDIX

Opinion, dated February 21, 1939, of State District Judge Guy Stevens, in suit brought in the District Court of Jerome County, Idaho, for foreclosure of maintenance lien for the year 1932.

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

NORTH SIDE CANAL COMPANY, LIMITED, a corporation, Plaintiff,
vs.
TWIN FALLS NORTH SIDE INVESTMENT COMPANY, LIMITED, a corporation, Defendant.

2053
MEMORANDUM DECISION

The plaintiff is a Carey Act Operating Company, and has brought this action for the purpose of foreclosing the lien of assessments levied by said company for operation and maintenance for the year 1932 upon certain lands and water rights described in the complaint.

The Twin Falls North Side Land and Water Company, Limited, was the Carey Act Construction Company of the Carey Act Project of which the plaintiff is the Operating Company.

The Twin Falls North Side Investment Company was a subsidiary corporation of the Construction Company. The stock of such subsidiary corporation having been held and owned by the Construction Company.

The Construction Company pursuant to and as authorized by the State Contracts executed its deed of trust to the American Trust and Savings Bank, trustee, for the purpose of securing funds with which to construct the project as provided in the State Contracts. Bonds in the sum of five million dollars were issued by the Construction Company and the money derived from the sale of these bonds was used in the construction of the project.

In December, 1927, The Continental National Savings Bank and Trust Company by various mergers became the successor trustee for the bondholders.

The Construction Company organized the North Side Canal Company as a corporation and said corporation then

issued its stock in the sum of two hundred thousand dollars, which was delivered to the Construction Company, all pursuant to the State Contracts. The Construction Company obligated itself, under the State Contracts, to sell water rights to Carey Act Entrymen on the segregation, and to others whose lands could be irrigated from the canal system for specified sums. Upon the sale of a water right to a settler by the Construction Company, a written contract was entered into by the Construction Company and the settler and a certificate of stock of the Operating Company was issued upon certain conditions to the purchaser of the water right, entitling the owner thereof to one-eightieth of a cubic foot of water per second of time for each acre of the land described in the contract. Upon the execution of these contracts, they were, from time to time, assigned to the trustee for the bondholders, and thereupon became subject to the lien of the trust deed, and payments upon the contracts were applied to the liquidation of the bonds. In 1913, prior to the completion of the system, and before water had become available for the irrigation of all the lands in the project, the Construction Company became insolvent. The bondholders then appointed a Bondholders' Protective Committee, who advanced large additional sums of money on behalf of the bondholders, which sums were used for the completion of the irrigation system. The committee acting in conjunction with the trustee took over the project and operated it until 1921, at which time the project was turned over to the Operating Company.

The Construction Company entered into numerous contracts with settlers for the sale of water rights and these contracts were assigned to the trustee. On many contracts the settlers failed to make the payments as specified, and after default, the trustee proceeded to foreclose the liens in some cases, and in others took deeds in lieu of foreclosure. The lands and water rights involved in this action were a portion of those thus acquired by the Construction Company, and its subsidiary corporation, or the successor or assigns of the Construction Company prior to 1932. A controversy having arisen among the interested parties as to the relative priority of the liens for assessments for maintenance and operation, and the liens of the water contracts, a written agreement was entered into in 1926 by which the parties endeavored to adjust their differences and avoid litigation. The Operating Company levied an assessment upon the lands and water rights herein involved for the year 1932, and it seeks to foreclose said lien in this action and have said lien established as prior to any lien claimed by defendant.

Defendant states in its brief (J-28): "It is the contention of defendant that any assessments levied by plaintiff for maintenance are subject and subordinate to defendant's prior construction liens; and that this is true not only while the property is under contract of sale to the settler, but in case of unsuccessful sales, then after repossession of the property by foreclosure or quitclaim deed."

On page (J-6) of its brief, the defendant says: "This property (referring to the property involved in this suit) the defendant claims to hold—until resale to other settlers—exempt from assessment the same as if it had never been sold at all, inasmuch as the previously attempted sale has failed and come to naught.

"The plaintiff Operating Company, on the other hand, claims that by appropriate proceedings for imposing a maintenance assessment during the year 1932 it has a valid lien upon such portion of this property as is described in its complaint which lien is prior and paramount to any lien or claim of the construction company or its bondholders; and in this suit it is seeking to foreclose its 1932 lien."

The plaintiff claims a prior lien for assessments under the provisions of Section 41-1901, Idaho Code Annotated, which provides as follows:

> "Any corporation heretofore organized or any corporation that shall hereafter be organized for the operation, control or management of an irrigation project or canal system, or for the purpose of furnishing water to its shareholders, and not for profit or hire, the control of which is actually vested in those entitled to the use of the water from such irrigation works for the irrigation of the lands to which the water from such irrigation works is appurtenant, shall have the right to levy and collect from the holders or owners of all land to which the water and water rights belonging to or diverted by said irrigation works are dedicated or appurtenant regardless of whether water is used by such owner or holder, or on or for his land; and also from the holders or owners of all other land who have contracted with such company, corporation or association of persons to furnish water on such lands, regardless of whether such water issued or not from said irrigation works, reasonable tolls, assessments and charges for the purpose of maintaining and operating such irrigation works and conducting the business of such company, corporation or assoscation and meeting the obligations thereof, which tolls, assessments and charges shall be equally and ratably levied and may be based upon the number of shares or water rights held

> or owned by the owner of such land as appurtenant thereto or may be based upon the amount of water used; and such company, corporation or association of persons shall have a first and prior lien, except as to the lien of taxes, upon the land to which such water and water rights are appurtenant, or upon which it is used, said lien to be perfected, maintained and foreclosed in the manner set forth in this chapter: provided, that any right to levy and collect tolls, assessments and charges by any person, company of persons, association or corporation, or the right to a lien for the same, which does or may hereafter otherwise exist, is not impaired by this chapter."

The defendant claims a prior lien under the provisions of Section 41-1726, Idaho Code Annotated, which provides as follows:

> "Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired."

It appears that the plaintiff has complied with the provisions of Title 41, Chapter 19, I. C. A., 1932, with respect to levying, filing its claim of lien, and proceedings to foreclose its lien.

The plaintiff contends that the Supreme Court of Idaho has decided that the Operating Company has a prior lien to that of the Construction Company, and that this court is bound by said decisions and cites the case of Carlson-Lusk Hardware Company vs. Kammann, 39 Idaho, 654, and Trust and Savings Bank vs. Werner, 36 Idaho, 601, in support of its contention.

It became necessary therefore to examine those decisions to ascertain if they are authority in support of plaintiff's position. The question involved in the Lusk Case was the relative priority of the lien of a mortgage and the lien of a Carey Act Operating Company for an assessment. The Court there held that the lien of the mortgage was prior to that of the assessment, and intimated that had it been

alleged and shown by the evidence that the Carey Act Operating Company was actually controlled by the Water Users themselves, it would have held that the lien of the assessment was prior to that of the mortgage. The Carey Act Construction Company was not involved in the case and the decision in the case does not support the contention of plaintiff in this case.

The question involved in the Werner Case was whether the lien of a Carey Act contract was prior to the lien for taxes. After quoting C. S., Sec. 3019 (now 41-1726 I. C. A.) the Court said:

> "Under C. S., Sec. 3019, supra, the only liens to which the lien of a Carey Act contract is superior are those created or attempted to be created by the owner and possessor of the land * * *."

This is the language relied upon by the plaintiff. The Supreme Court in the Werner Case quoted from the case of Minnesota vs. Central Trust Company, 94 Fed., 244, 36 C. C. A., 214, as follows:

> "* * * it cannot be inferred that the lien for personal taxes * * * was intended to be subordinate to all prior private liens, because the legislature failed to say that it should be deemed paramount. On the contrary, considering the character of the obligation and the dignity usually accorded to such liens, in public estimation, and above all, considering the necessity which exists for giving them priority in order that the public revenues may be promptly and faithfully collected, we conclude that the inference should be that the lien was intended by the legislature to be superior to all liens, prior or subsequent, claimed by individuals, and that nothing should be allowed to overcome this inference but a plain expression of a different purpose found in the statute itself."

It will thus be seen that the facts in the Werner Case are different from those in the instant case, and it is my opinion that the decision in that case is not authority for the position of plaintiff. This opinion of mine is strengthened by the decision of the United States Supreme Court in the case of Portneuf-Marsh Valley Canal Company vs. Brown, et al., 47 Supreme Court Reports, 692. After a consideration of the provisions of the Carey Act Law, the State Contracts, and pertinent statutes, having in mind the purpose to be attained, I am of the opinion that the decision of the United States Supreme Court is based upon logic and reason. No other

case has been called to my attention where the question involved was relative priority of the lien of a Carey Act Construction contract, and the lien for assessments of an Operating Company. It seems to have been the purpose and intent, derived from the pertinent statutes and contracts, that those who furnished the money for the construction of a Carey Act project should be reimbursed, and to that end, that a first lien should exist for accomplishing that purpose. If a lien of a Carey Act contract is superior only to liens created by the owner and possessor of the land and is subject to the lien of attachments, executions, materialmen and laborers, then such a lien is of very little value and no one would advance money for the construction of a project.

It is my understanding of the position of plaintiff, that when the Construction Company, its subsidiary, successor, or assigns acquired title to the lands and water rights in question either by foreclosure or deed in lieu thereof, the nature of the title, subject to the right of redemption, was an absolute unqualified one, relieved of all the burdens and obligations of the State Contracts, and said lands and water rights were subject to assessments for mointenance and operation the same as if acquired by some individual having no connection with the Construction Company. I cannot agree with this contention. Suppose that the Construction Company sold a water right to an Entryman and that the Entryman failed to make the necessary improvements on the land for which the water right was sold, and therefore never acquired title to the land, and that the Construction Company, because of default by the purchaser, foreclosed its lien upon the water. Can it be said that the Construction Company could resell such water right in violation of the State Contracts? I think not. The water right would then be subject to the lien of the trust deed, and the situation would be the same as if the water right had never been sold and would be exempt from assessments for maintenance and operation. The Construction Company would still be obligated by the Carey Act statutes and State Contracts to sell the water right to any other Entryman applying therefor. I am of the opinion that where a Carey Act contract has been foreclosed because of default in the payment of the purchase price of the water, or where for that reason a deed has been executed conveying the property to the Construction Company, as was done in this case, that the water right and land is exempt from assessments for maintenance and operation the same as if the contract had never been made and the water stock issued. The stock was not subject to assessment before it was issued, and if in case of default, the Construction Company takes the necessary steps to preserve its security thereby subjects the security to liens for

assessments, operation, attachments, etc., then it would destroy the value of its security by undertaking to protect it. This, to my mind, would be contrary to the clear intent and purpose of the Carey Act laws and contracts. When title to the lands and water rights involved was acquired by the Construction Company or its successor or assigns the trust deed was in existence, and this was true when their assessments were levied by the Operating Company, and such lands and water rights were subject to the lien of the trust deed, and the lien of the bondholders who furnished the money for the construction of the project would be a prior and paramount lien to that of the Operating Company, even though they had a legal right to levy assessments for maintenance and operation under those circumstances. When title to the land and water rights was acquired by foreclosure or by the acceptance of deeds the grantee acquired only a limited ownership and was still subject to the obligation of the State Contract with respect thereto.

Upon a consideration of the facts and record in the Portneuf-Marsh Case, I am convinced that the facts in the instant case are essentially the same, and that the decision in that case is controlling in this case. I have considered the questions of merger and estoppel raised by the plaintiff and they appear to me to be without merit. I am therefore of the opinion that defendant is entitled to judgment with costs. Defendant's counsel are requested to prepare findings-of-fact, conclusions-of-law and decree and serve a copy upon counsel for plaintiff at least ten days before presentation to the Court for signature.

DATED this 21st day of February, 1939.

GUY STEVENS,
District Judge.

No. 9049

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTH SIDE CANAL COMPANY, LIMITED,
a Corporation, *Appellant,*

vs.

IDAHO FARMS COMPANY, a Corporation,
Appellee,

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division

WAYNE A. BARCLAY,
Jerome, Idaho;

FRANK L. STEPHAN,
J. H. BLANDFORD,
Twin Falls, Idaho;

RICHARDS & HAGA,
Boise, Idaho,

Attorneys for Appellant.

FILED

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STATEMENT

We are confused by the celerity with which counsel for appellee shift their arguments and shuffle the facts.

Counsel emphasize repeatedly the equities of appellee. They seek to leave the impression that someone other than appellee was responsible for the enterprise which, they now say, has ended in disaster and to the great misfortune of appellee and its bondholders.

Appellee Was the Promoting Company

Appellee selected the lands to be reclaimed and fixed the terms upon which the water rights were sold to settlers. Section 41-1703 Idaho Code Annotated provides for the initiation of Carey Act projects. This section provides that:

> "Any * * * incorporated company * * * desiring to construct ditches, canals or other irrigation works to reclaim land under the provisions of this chapter, shall file a request for the selection, on behalf) of the state, * * * of the land to be reclaimed, designating said land by legal subdivisions.

> "This request shall be accompanied by a proposal to construct the ditch, canal or other irrigation works necessary for the complete reclamation of the land asked to be selected."

Section 41-1707 provides:

> "In case of approval, the department shall file in the local land office a request for the withdrawal of the land *described in said proposal.*"

And Section 41-1709 I.C.A. provides:

> "Upon the withdrawal of the land by the Department of the Interior, it shall be the duty of the Department of Reclamation to enter into a contract *with the parties submitting the proposal,* * * *"

Thus, the lands which appellee now contends are worthless and can not be resold *were selected by appellee.* It recommended to the State of Idaho that such lands be segregated from the public domain by the United States Government for reclamation by appellee under the Carey Act.

The state contract (R. 184) provided that appellee had the right to collect one-fifth of the purchase price of water rights in cash before the entryman could file on the land, and it could require that the remainder be paid in five equal annual instalments.

The default by the settler was obviously due to the following factors, all under the control of appellee:

(a) A small cash payment instead of 20% of the purchase price at the time the contract was entered into;

(b) The lands were rough and unsuited for irrigation and farming;

(c) Appellee furnished a wholly inadequate water supply.

The poor quality of the land and the wholly inadequate water supply and the adverse conditions con-

fronting the new settler were such that he chose to forfeit the small cash payment rather than carry out his contract.

Appellee therefore can not shift the responsibility for its misfortune on the State of Idaho, but it seeks by this case and by the position it now takes to shift it onto the settlers who remained on the project and who have spent approximately $2,000,000 to acquire additional water for their own lands and to improve the system so that they can make a reasonable success of an enterprise that would have been a complete failure except for the improvements which the settlers have made at their own expense and on their own account and through appellant as their operating company. In our opening brief (p. 67) we showed how appellant has expended about $669,000 for the purchase of additional water rights and for necessary improvements on the irrigation system, and counsel for appellee in their brief (bottom p. 101, top p. 102) show how the individual settlers have purchased from the American Falls Reservoir District water rights under the irrigation district plan, to the amount of 1.7 acre feet per acre, and we now add simply that this was purchased and assessed by the district against the land of the settlers, at a cost to the settlers of about $1,350,000, thus making an additional outlay of more than $2,000,000 by appellant and its stockholders to obtain the kind of irrigation system and the amount of water that appellee had agreed to provide for the consideration which it received from the settlers.

There are many irrigation projects in the West, where the irrigation company has shifted to the settlers the burden of providing for themselves an adequate water supply because the company failed to carry out the contracts which it had made when it sold the water rights, but we believe this is the first case to come before any Court in which the company

not only shifts that burden onto the settlers, but asks, under a plea for equitable relief, that the Court should also shift onto the settlers the additional burden and expense of also providing an adequate water supply and an adequate irrigation system for the lands which the company itself has acquired from settlers who gave up in despair.

We shall not further discuss the equities of appellee and its stockholders, who, counsel argue, the Court should now assume were the original bondholders who furnished the money to undertake the construction of the project before there were any tangible assets to secure the bonds. Suffice it to say, there are now no bondholders and we may safely assume that the stock has long since passed into the hands of speculators who hope to profit by the changed position which appellee has now taken since it passed from under the control of the bondholders' committee.

The Plea in Abatement

Counsel for appellee state the gist of the controversy in the very opening paragraph of their brief. They say:

> "This suit involves primarily the relative priority of a claim on the part of the bondholders of a Carey Act construction company to be reimbursed for the cost of constructing an irrigation system as against the subsequent claim of a Carey Act operating company for the cost and expense of maintaining and operating the irrigation works so constructed."

The only error in the statement is that the suit is not on the part of the "bondholders," but on the part of the company that promoted the project. Whether any bondholder is a stockholder of the company is merely a matter of conjecture and may be true one day, but not the next.

As stated by counsel for appellee, the sole question is the relative priority of the liens claimed by appellee and by appellant on the land described in Exhibit 1 to the findings of fact (R. 114-133).

Counsel also argue at length and with much emphasis that the decision rendered on February 21, 1939 (set out in full in the appendix of Appellee's brief), by District Judge Stevens, in case number 2053 from Jerome County, covers the identical questions that must be decided in the case at bar.

We agree that the sole question before Judge Stevens was the relative priority of appellant's and appellee's liens against the identical land involved in the case at bar. Reduced to its simplest form, the question is not whether appellant's lien for the maintenance charges for 1932, 1934 and 1937, is superior or paramount to appellee's so-called construction lien, but whether appellee has a lien on the lands in question under Section 41-1726 I.C.A. that is paramount and superior to liens under Section 41-1901, et seq., I.C.A., in favor of appellant on the *same lands.*

This is not a case where suits in the State and Federal Courts simply involve the construction of the same statutes and where the construction by one Court might influence the decision of the other Court. We have here two suits between the *same parties,* involving the *same lands*—each party claiming a lien paramount to the lien of the other—and involving the construction of the statutes under which the rank and dignity of the liens must be determined.

The broad question of priority of liens against the same lands is involved in both suits. Appellee's contention that the 1932, 1933, and 1934 liens are not the *identical liens* involved in the case at bar takes too narrow a view of the rule of comity and the law governing the abatement of actions; it is a feeble and

unsatisfactory answer to appellant's claim that this action should be abated until one of the State Court cases has been decided and the Idaho statutes construed by the highest Court of the State. By no other procedure can we have harmony and uniformity in the administration of the law and avoid conflicting constructions and conflicting decisions that will prove most embarrassing in the administration of all Carey Act projects, and particularly in the case of the project here involved.

It is most significant that appellee has strenuously sought to obtain a decision from this Court, before the Supreme Court of Idaho is afforded the opportunity of deciding the same questions and construing the Idaho statutes in the case recently decided by Judge Stevens. His decision was rendered on February 21 (p. vii of appendix to Appellee's Brief), and it closes with the statement:

> "Defendant's counsel are requested to prepare findings of fact, conclusions of law, and decree and serve a copy upon counsel for plaintiff at least ten days before presentation to the Court for signature."

Counsel for appellant have repeatedly urged counsel for appellee to comply with the Court's request so that appellant may promptly perfect its appeal, but up to this time (April 13), over seven weeks after that decision was rendered, the findings, conclusions, and decree have not been served on or presented to appellant or the Court.

In cases involving important state statutes, and especially where they have far-reaching effect in the everyday administration of the law, the Federal Courts have uniformly invoked the rule of comity, and in the interest of harmony have taken advantage of the

opportunity to secure the construction of the state statutes by the highest Court of the State. Under such circumstances the Federal Courts have never invoked technical rules or contentions as to their own jurisdiction, but they have proceeded under a broad view of a procedure that would avoid conflicting judgments and conflicting determinations that would embarrass the state in the administration of its statutes. In U.S. vs. Bank of New York, 296 U.S. 463, 480, 80 L. Ed. 331, 340, the Court, in discussing the practical question on which the rule of comity is based, said:

> "The statutory grant of jurisdiction to the district court leaves open the question of the propriety of its exercise in particular circumstances. Even where the District Court has acquired jurisdiction prior to state proceedings, the character and adequacy of the latter proceedings in relation to the administration of assets within the state, and the status of those assets, may require in the proper exercise of the discretion of the Federal Court that jurisdiction should be relinquished in favor of the state administration."

This question was fully discussed in our opening brief, pp. 38 to 48. That the suits in the State Court and the Federal Court are proceedings in rem was there discussed at length and requires no further comment.

In Dennison Brick & Tile Co. vs. Chicago Trust Co., 286 Fed. 818 (C.C.A. 6), the Court said, page 821:

> "In respect of classification as to proceedings *in rem* we can see no valid distinction in principle, on the one hand, between a proceeding to enforce a lien or foreclose a mortgage, and, on the other hand to remove a lien or set aside a mortgage. Statutes of the latter character, equally with those

of the former, act directly upon the *res*, the status of the title. Nor do we find any distinction upon authority'."

That there is an identity of issues in the cases pending in the State Court and the case at bar is repeatedly emphasized by counsel for appellee. We call particular attention to counsel's enthusiastic comments on the recent decision of Judge Stevens of the State District Court (pp. 80-81 of Appellee's Brief). Under the circumstances presented by the record, the Court last acquiring jurisdiction will defer action until the final determination in the action first commenced, involving the same parties and subject matter.

Amusement Syndicate Co. vs. El Paso Land Improvement Co., 251 Fed. 345.

Appellee has referred to the fact that Judge Lee, in case number 2053 in Jerome County, recently decided by Judge Stevens to whom the case was later assigned, enjoined appellee from seeking relief in the Federal Court from the assessments levied by appellant during the year 1932, 1933, and 1934. The facts briefly stated are that appellee's original complaint in the Court below embraced the assessments levied during the years *1932* to 1937, inclusive. Case number 2053 in the District Court of Jerome County involved the assessments for 1932 only, and appellant in *that suit* filed an ancillary petition for an injunction against appellee, enjoining it from prosecuting any action in the Federal Court involving the same assessment that was involved in case number 2053 and other actions pending in the State Courts for Jerome and Gooding counties. The application for the injunction being purely ancillary to the suit in which it was filed, Judge Lee presumably doubted his jurisdiction to extend the injunction order

so as to cover the assessments levied during 1935 to 1937, inclusive, especially because the suits on the 1935 assessment for Jerome and Gooding counties were filed after the filing of appellee's suit in the Federal Court. Judge Lee accordingly went as far as it was thought his jurisdiction could possibly permit him to go in an ancillary matter.

Appellee thereupon amended its complaint in the Federal Court and dismissed therefrom all reference to the assessments for the years 1932 to 1934, inclusive, and appellant filed its plea in abatement as to the assessments for 1935 to 1937, inclusive. It is unfair to the State Court for appellee to draw the conclusion that the State Court recognized the prior jurisdiction of the Federal Court, for the assessments for 1935 to 1937, inclusive, or that the proceedings in the Federal Court did not involve the same subject matter as is involved in the cases in the State Court. The proceedings in the State Court were restricted by the fact that the petition was an ancillary proceeding, but even at that we believe the State Court could, with perfect priority, have enjoined appellee from proceeding with its case in the Federal Court. However, it was thought that the proper procedure to reach the matter under the rule of comity was by plea in abatement in the Federal Court, and we submit that the Trial Court committed error in not abating the action, or deferring further proceedings therein until the final determination of the suit in the State Court.

The Actions Commenced by Appellant in the State Court for Foreclosure of the 1935 and 1936 Assessments Were Commenced in a Proper Court and the Actions Were Pending at the Time of the Trial of the Instant Case.

Appellee, pp. 92 to 99 of its brief, argues that the suits in the State Court for the foreclosure of the assessments for 1935 and 1936 were not commenced

in *a proper court.* This subject was discussed at some length in our opening brief, pp. 29-30 and 73-78, and we shall not repeat what was there said. It is sufficient to say that appellee has cited no authority holding in substance or effect that, where there is concurrent jurisdiction in the State and Federal Courts over liens, the Court first acquiring jurisdiction can go farther than to enjoin the litigant from prosecuting his action in the other jurisdiction, pending a final determination of the cause in the Court having first acquired jurisdiction.

In the case at bar appellee brought a suit to quiet title on the ground that its lien was exempt from assessments levied by appellant under the state statutes authorizing such assessments. Within a short time thereafter it became necessary for appellant, in order to preserve its rights under the state statutes, to commence an action for the foreclosure of its liens for the assessments of 1935 and 1936. It brought its suits in the District Court of the proper county. Both the constitution and the statutes of the state confer upon that Court general jurisdiction of all cases. That the commencement of such foreclosure suits protected appellant's rights seems too clear for argument.

The evidence offered as to the commencement of such suits should have been admitted by the Trial Court. If the suits in the State Court interfered with the suit in the Federal Court, the proper procedure would have been for appellee to have filed a plea in abatement in the State Court, or requested an injunction order in the Federal Court against appellant, proceeding with the cases in the State Court. For the Federal Court to hold that the State Court was without jurisdiction was clearly error.

Boston Acme Mines Corp. vs.Salina Canyon Coal Co., 3 Fed. (2d) 729, 735.

To hold, as did the Trial Court in this case, that the proceedings in the State District Court were a nullity, is clearly without precedent and is reversible error. Counsel's argument is not convincing and it lacks supporting authority.

Estoppel

Counsel contend that the failure of Mr. R. E. Shepherd to protest against or object to the assessments levied against appellee's lands does not support estoppel against appellee because, they say, Mr. Shepherd was general manager of appellant and was being paid by appellant for managing and directing its business; that where the general manager is an officer of two corporations, neither corporation can invoke the rule of estoppel against the other. They cite as authority for this novel proposition 14A C.J. 365, and support their contention by quoting one sentence from that text, as follows:

> "But one corporation is not liable for the acts of such officers done in the discharge of their duties toward the other corporation."

The statement is not in point and the text cites but one case in support of the statement. The case is Holder vs. Cannon Mfg. Co., 135 N.C. 392. In that case Holder had at one time been employed by the Cannon Mfg. Co., a textile company. Because of strikes and labor controversies he had apparently severed his connection with that company and entered the employ of the Gibson Mfg. Co., another textile company in the same community. The two companies had the same general officers, managers and assistant managers. In course of time Holder was discharged by an assistant manager of the Gibson Co., who was also assistant manager of the Cannon Co. Holder sued the Cannon Co. and alleged that it had

requested the Gibson Co., through the assistant manager, to discharge plaintiff. Holder obtained judgment against the Cannon Co., and this was affirmed on appeal, apparently because all the evidence had been admitted without objection. In the course of the opinion the Court made some statement which is the basis for the sentence in Corpus Juris quoted by the appellee.

Mr. Shepherd was the general manager of appellee and the representative of the bondholders; he was the only person on the project authorized to speak for all the interests merged into appellee and which appellee now claims to represent. By common consent and the approval of all parties he was also general manager of appellant, in which appellee and the bondholders' committee were large stockholders. This is not a case where an agent of two principals, or an officer of two corporations handled transactions or negotiated contracts between the principals, or the corporations involving conflicting interests. Appellant's stockholders and directors, upon the advice and approval of Mr. Shepherd and at his request, made expensive improvements on the irrigation system and purchased additional water rights for the benefit of all stockholders, including appellee and the bondholders' committee. These dealings involved no adverse or conflicting interests. Mr. Shepherd acted in the utmost good faith and for what he considered the best interests of all parties. However, as the representative of appellee and the bondholders' committee and as their manager and spokesman, he made no protest against assessments being levied against their lands for the payment of such improvements and additional water rights.

Obviously if the action which appellant was taking in the levying of assessments was contrary to the interests of the other parties which Mr. Shepherd rep-

resented, it was his duty to so advise appellant. On the contrary he acquiesced in the actions of appellant and so did appellee and the bondholders' committee, for they paid all assessments levied for upwards of 25 years. It was Mr. Shepherd's duty to think and act for the bondholders' committee and for appellee as well as for appellant. There was no one else on the project to whom notice of appellant's actions could be given. There was no one on the project but Mr. Shepherd who could speak with authority as to what appellee and the bondholders' committee approved or disapproved.

The fact that Mr. Shepherd was manager of appellant gave him advance information as to the actions which appellant was about to take. That information, in course of time, would have been conveyed to appellee and the bondholders' committee. The assessments were levied and they were paid, not only with the approval of their general manager but upon the advice of their general counsel, Judge E. A. Walters (R. 238-239), who outlined clearly in his letter to Mr. Hurlebaus, secretary of appellant, the basis upon which appellee would pay assessments for maintenance and operation charges levied by appellant.

The opinion of this Court was rendered on May 25, 1925, and Judge Walters' letter was dated October 30, 1925, or more than five months after the opinion was rendered. Judge Walters' opinion involved a specific tract of land, which is also involved in the case at bar. It stated definitely that from the date of the transfer of the legal title from the settler to appellee "the prior lien of the Carey Act contract no longer exists and the lien of the canal company becomes paramount" (R. 239-240). That construction was acquiesced in by appellee and by the bondholders' committee and thereafter followed. Appellee never questioned the correctness of that construction of the

statute until the commencement of this action.

Counsel have shifted their position since the trial of the case as to the grounds on which the letter should be excluded. The argument now made is not applicable to the case. Judge Walters was an *agent* of the bondholders' committee—he was the committee's legal advisor. He was also the legal advisor of appellee and of the various interests which it now represents. *He was the authorized agent of these interests, charged with the duty of guiding and directing them in their legal matters,* and that is why appellant requested him to outline appellee's position on the payment of the assessments, in view of the decision of this Court in the Portneuf-Marsh case.

It matters not whether Judge Walters' opinion was right or wrong. That is beside the case. On this matter he was the spokesman for appellee and the bondholders' committee. They approved his advice and they paid their assessments according to the formula which he outlined. They confirmed his construction of the statutes.

The action of appellee and the bondholders' committee in paying the assessments after this opinion of Judge Walters contradicts conclusively the argument of counsel for appellee that the payments were merely voluntary contributions to appellant's expenses and were not based upon any concurrence in appellant's construction of the statutes under which the assessments were levied.

The rule of estoppel applies with all its force under the circumstances stated.

Counsel repeatedly state that appellant claims an "equitable lien." We claim no such lien. We claim a lien under the statute, and that appellee is estopped to question the construction of the statute for the reasons heretofore stated and discussed in our opening brief (pp. 28-29, 65-72).

Decision of Judge Stevens in the State Court Case, No. 2053

Counsel have added as an appendix to their brief the decision recently rendered by Judge Stevens in the State District Court case which was assigned to him after Judge Lee issued the injunction against appellee, heretofore referred to (R. 213).

We have the highest regard for Judge Stevens, but he was handicapped by the press of other business and by limited experience with the Carey Act statutes and Carey Act development. What we consider as errors in his opinion are due entirely to the confusion created by the specious argument of counsel for the appellee.

Counsel quote (pp. 81-83, their brief) at length from Judge Stevens' opinion and they refer to it as being "particularly devastating to appellant's contention on this appeal."

Judge Stevens uses the following illustration in his opinion (pp. 81-82, Appellee's Brief): If an entryman should fail to comply with the law *before acquiring title to the land,* the construction company, on foreclosing its lien upon the water, would be compelled to resell the water rights to another entryman on the same land; that in such case the state contract would control the construction company in the sale of the water and the stock would be exempt from assessment, pending a resale thereof to another entryman. Judge Stevens then applies that principle to a case where the company forecloses *after title has been acquired* by the entryman and the opinion concludes that if the company becomes the owner of the land it must hold the land and water rights subject to resale to another entryman, as in the case first referred to, where the entryman had not acquired title to the land. The conclusion thus drawn is directly contrary to the state statutes.

We know of no case where any company has ever foreclosed a water contract on land where the entryman had not acquired title. In such instances the entry itself is cancelled either at the instance of the state or the construction company, or another entryman who files a contest against the original entryman, proves noncompliance with the law, and obtains a cancellation by the state of the original entry. The original sale of water rights for the land is thereby automatically cancelled and the land restored as part of the unentered Carey Act land in the project. It may later be re-entered as any other Carey Act land and a new water right contract entered into with the second entryman, pursuant to the terms of the state contract.

The fallacy in Judge Stevens' argument arises from the fact that he wholly overlooked the statutes which govern foreclosure of the lien of the water contract *after* the entryman has made final proof and obtained title to the land. Section 41-1729 I.C.A. provides for a foreclosure sale upon the publication of notice of sale for a period of six weeks and requires that the land be sold to the highest bidder by the sheriff, who issues the usual certificate of sale to the purchaser.

Section 41-1730 I.C.A. provides that if the holder of the construction or water contract lien bids in the property at sheriff's sale, it can not bid more than the amount due and unpaid on the water right, plus costs of sale, etc.

Section 41-1732 provides that when the land is purchased by someone other than the lienholder, the sheriff shall pay the lienholder the amount due it out of the proceeds of sale, plus interest and costs, and the balance, if any, shall be paid to the owner of the land, as in other foreclosure sales.

Section 41-1733 provides that the owner may redeem from the foreclosure sale at any time within nine

months and, failing to do so, he has no further interest in the land and the title vests absolutely in the purchaser, except where the lienholder is the purchaser.

Section 41-1734 provides that where the lienholder is the purchaser at the foreclosure sale, if the landowner fails to redeem within nine months, then at any time within three months thereafter any other person may redeem upon paying the amount for which the property was purchased at foreclosure sale, with interest and costs.

Section 41-1735 provides that "if the land and water rights shall not be redeemed by any person within the times and in the manner hereinbefore provided, it shall be the duty of the sheriff, upon presentation of the certificate of sale by the original purchaser, to issue a deed to such purchaser."

Obviously, the sheriff's deed concludes the matter and vests title absolutely and without qualification in the purchaser, whether that purchaser be the lienholder or any other person. These statutes Judge Stevens wholly overlooked and his opinion is obviously in direct conflict with the statute and that would seem to be the end of the "devastating" effect of the decision.

No one has heretofore ever suggested that the state authorities, through the state contract, can exercise any control over the land and water rights after the sheriff's deed has issued, or after the land has been patented and the water rights have become appurtenant thereto. Under the federal act the state's trusteeship extended only to the completion of the irrigation works and the sale of the unpatented land to qualified entrymen in tracts not exceeding 160 acres.

Judge Stevens further comments on the fact that unless the Carey Act lien, under Section 41-1726, be held to be superior to attachment liens and other liens and executions, the construction company would have

no such security as obviously contemplated by the statute. This illustration was also used by the Supreme Court of the United States in the Portneuf-Marsh case. Both Courts overlooked the fact that Section 41-1727, set out in the appendix to our original brief, provides that the contract for the sale of the water right "upon which the aforesaid lien is founded, shall be recorded in the office of the county recorder of the county where the said land is situated." This gives the holder of the construction lien full security against all subsequent liens and other things that troubled Judge Stevens and the Supreme Court of the United States, except the lien of the operating company for protecting the security.

This matter was discussed in our original brief, p. 61, and we shall not refer to the matter further at this point, for there is obviously not the slightest danger from the things that seemed so serious and important to Judge Stevens. The recording statutes furnish to the holder of the construction lien the same full and ample protection the law has for ages furnished to the holders of mortgage liens. We note also that the recording of the lien for the water right is substantially simultaneous with the entry of the land and before title is acquired by the entryman; hence, no prior lien could be created by attachment or otherwise that would endanger the lien under the water contract.

The By-Laws of the Operating Company

Counsel, on p. 5 of their brief, call attention to Section 5 of Article 10 of the By-Laws of appellant, and urge that it supports their contention here. In brief, that by-law provides that assessments for maintenance shall not be made until the land shall have been sold or contracted to be sold to entrymen, and, further, that "all assessments, maintenance and other

charges must be paid by the purchaser or *owner* of the stock and not by the Twin Falls North Side Land and Water Company, its successors or assigns."

The operating company, to begin with, was but a creature of the construction company, organized by the latter pursuant to the state contract. It had no assets; its only function was to issue stock certificates as requested by the construction company, but as its stock was issued it received nothing in return. It was devised by the parties as a convenient method for placing each entryman, at the time his entry was made, into an operating company that would function after the system had been completed—but would have no duties or assets prior thereto.

The above by-law was intended to cover two things: first, that no assessments should be levied on the stock until it had been made appurtenant to land which would be described in the stock certificate (see form of certificate, R. 23), and, second, it emphasized the fact that when made appurtenant to land, the assessments should be paid by the entryman and not by the construction company, which was not the owner of the stock but only held it as security (R. 208). That by-law was for the information of the entryman and it was not a prohibition against the construction company later becoming the owner by purchase from the entryman.

The limitations on the length of this brief will not permit us to discuss other questions urged by counsel for appellee.

Attention is again called to the fact that assessments levied by appellant fall in the class of "taxes," and such assessments and the statutes under which they are levied are subject to the same rules of construction as general taxes and the statutes under which such taxes are levied. This matter was discussed in our opening brief, pages 25, 48-50.

The law of merger applies to appellee's lien. This was discussed in our opening brief, pages 24, 50-55.

The decisions of the Idaho Supreme Court, in substance to the effect that appellant's lien is subordinate only to the lien of general taxes and is superior to the Carey Act lien and other liens, are in point and they are not dicta as claimed by counsel for appellee. An examination of the cases cited in our opening brief, pages 55 to 65, on this point, is a sufficient answer to appellee's argument.

For the reasons urged in our assignment of errors and in the opening brief and in this brief reply, we respectfully submit that the decree and findings be vacated and set aside and the cause remanded with appropriate instructions.

Respectfully submitted,

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No. 9049

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTH SIDE CANAL COMPANY, LIMITED,
a corporation, *Appellant,*

vs.

IDAHO FARMS COMPANY, a corporation,
Appellee.

PETITION OF APPELLEE FOR REHEARING

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division

EDWIN SNOW,
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1959

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PETITION OF APPELLEE FOR REHEARING

In deciding this case, the court considered itself bound by the very recent decision of the Supreme Court of Idaho in the case of North Side Canal Company, Limited, v. Idaho Farms Company, ... Pac., ..., (Rehearing denied December 2, 1939) which involved the identical basic question presented here. In its opinion, this court said:

> "The point upon which the state court rested its decision is purely one of local law concerning which that court speaks with conclusive authority."

However, the conclusion reached by this court makes it imperative that, if oppressive delays and

costly future appeals be avoided, the court express itself on one further point in controversy. This point likewise involves a local statute, but one that has never been construed by the Supreme Court of Idaho and indeed could not be conclusively construed by it on the aspect here presented:

After this suit had been brought by appellee in the federal court to quiet its title to the lands in controversy as against the maintenance liens herein asserted by the appellant canal company, the latter brought suit in the state court against appellee to foreclose its *1935 maintenance lien.* Except for the commencement of such suit, the 1935 maintenance lien would admittedly have been barred by limitation. Section 41-1905, I. C. A., relating to appellant's maintenance lien, provides as follows:

> "No lien provided for in this chapter binds any land for a longer period than two years after the filing of the statement mentioned in Section 41-1903 unless proceedings be commenced *in a proper court* within that time to enforce such lien" (Emphasis ours).

The court below rejected appellant's evidence of the commencement of these suits on the ground that under the circumstances and while this litigation was pending in the federal court the state court in which the action was commenced was not *"a proper court"* in which to commence the foreclosure within the meaning of Section 41-1905, I. C. A. By such ruling,

it vindicated and asserted its own exclusive jurisdiction with respect to the *res*. The trial court's ruling was assigned as error by appellant (Specification of Error No. 15, p. 17, appellant's brief). The matter is fully discussed in appellee's brief (page 92, et seq.).

It would have been wholly unnecessary for this court to consider this point if its conclusion on the fundamental question involved had been the same as that reached by the trial court; but since its conclusion on the fundamental question involved has been wholly different, in view of the very late decision of the Idaho Supreme Court, then the point becomes highly material and no mention of the matter occurs in the court's opinion. The case is reversed on the fundamental point discussed; that is, on the ground that in accordance with the view of the Supreme Court of Idaho, the appellee has no lien at all, but is the owner of the property. So this court not having expressed its view as to whether appellant's action to foreclose its 1935 maintenance lien was in the circumstances here presented begun "in a proper court", it will again be necessary that this cause be reviewed on appeal unless this court determine the matter now. We, therefore, request that a rehearing be granted or that without such rehearing the court amplify its opinion to cover the point here presented. It should perhaps be mentioned that appellant's maintenance lien for the year 1936 has since the trial of this cause likewise lapsed by limitation unless its lien has been preserved by foreclosure suit in the

state court while this cause has been pending and while, as we think, the controversy as to these liens was wholly within the jurisdiction of the federal court.

In support of the decision of the trial court on the point under discussion, we respectfully urge that the pertinent query is whether a foreclosure suit begun in the state court, which necessarily involves an irrepressible conflict of jurisdiction with the federal court, can be said to be "a proper court" within the meaning of Section 41-1905, I. C. A. No good purpose would be served by repeating the argument set forth on this point on pages 92 to 99, inclusive, of appellee's brief.

Respectfully submitted,

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Idaho Farms Company.

We, the undersigned, counsel for appellee herein, do hereby certify that in our judgment the foregoing petition for rehearing is well founded; and that it is not interposed for delay.

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A. F. JAMES,
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Attorneys for Appellee,
Idaho Farms Company.

No. 9049

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

NORTH SIDE CANAL COMPANY, LIMITED, a Corporation,
Appellant,
vs.
IDAHO FARMS COMPANY, a Corporation,
Appellee.

Appellant's Answer to Appellee's Petition for Rehearing

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division

WAYNE A. BARCLAY,
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FILED
JAN 19
PAUL P. O'BRIEN,

IN THE

United States
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vs.

IDAHO FARMS COMPANY, a Corporation,

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SUBJECT INDEX

STATUTES

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTH SIDE CANAL COMPANY, LIMITED, a Corporation,
Appellant,

vs.

IDAHO FARMS COMPANY, a Corporation,
Appellee.

Appellant's Answer to Appellee's Petition for Rehearing

Answering Appellee's Petition for Rehearing, Appellant says:

Because Appellee's action in the Federal Court was in the nature of an action to quiet title, Appellant was required to and did set up in its Answer to Appellee's Complaint the nature of its claims against the lands involved in the action. In paragraphs XI, XII and XIII of its First Affirmative Defense (R. 44-47), Appellant alleged that subsequent to the commencement of this case, it had commenced two actions in Jerome County and two actions in Gooding County to foreclose its maintenance liens for the years 1935 and 1936. The answer shows that these actions had been

commenced within the time and in the manner prescribed by the State statutes. During the course of the trial, Appellant offered testimony to prove that said actions had been timely commenced and indeed some of the testimony was received by the Court without objection from the Appellee, but Appellee thereafter moved to strike the evidence theretofore received and the motion to strike was granted (R. 217-218). The Court sustained the Motion to Strike on the ground that inasmuch as the actions to foreclose the 1935 and 1936 maintenance liens had not been commenced in the Federal Court, they had not been commenced "in a proper Court."

On pages 73-78 of Appellant's Brief we have set forth the reasons for contending that said actions were commenced in proper forums, and we believe it unnecessary to add to what was there said.

However, regarding Appellee's present request that a rehearing be granted or that without such rehearing the Court amplify its opinion and decide whether said actions were commenced in "proper courts," we submit:

1. That said question was collateral and merely incidental to the main issue involved in the suit and its determination was not necessary for a determination of the main issue decided by this Court in the opinion filed on November 22, 1939.

2. Appellee's suit was to quiet its title to the Carey Act lands which it had reacquired; it contended that Appellant could not, under the Idaho statutes, levy any assessment or have any lien thereon for maintenance and operating expenses,

and that Appellant's claim of lien was unfounded. Appellee's suit was commenced on November 24, 1937 (R. 30), or more than thirty days before Appellant was, under the State law, required to commence its action for the foreclosure of its lien for assessments levied in 1935. *Appellee's rights must be determined as of the time it commenced its action.* This Court has held that Appellant was entitled, under the Idaho statutes, to a lien on Appellee's lands, hence even if Appellant had filed no action to foreclose its lien for the 1935 assessment, Appellee could not prevail in this action, for its suit would in any event *be premature,* being filed before appellant was required to commence its suit to foreclose its lien for the 1935 assessment.

3. The Court, having determined the controlling question in the case, should not grant a rehearing for the purpose of considering the rulings of the Trial Court on evidence touching incidental issues that would not change the decision of the Court heretofore rendered.

4. Appellee may, in the foreclosure suits pending in the State Courts, plead the statute of limitations against the commencement of the actions for foreclosing the lien for the 1935 assessments, if it believes that the commencement of such suits in the State Court in December, 1937, was a nullity because of the pendency of Appellee's suit in the Federal Court. We submit that Appellee's point is one which it should set up in its actions in the State Court. That Court is

fully competent and is a proper tribunal to pass on the question as to whether Appellant's foreclosure suits were filed within the time and in the tribunal required by the state statutes. Appellee is not without relief if this Court directs a dismissal of the present action in the Federal Court.

5. If Appellant's actions to foreclose were not commenced in the proper Court, then Appellant's liens for 1935 and 1936 assessments have expired by lapse of time under the provisions of Section 41-1905, Idaho Code Annotated, which requires that such actions be commenced within two years after the filing of the statement mentioned in Section 41-1903. Section 5-808, Idaho Code Anontated, requires that the statute of limitations must be specially pleaded and, accordingly, Appellee's defense must be set out in its answers in the actions pending in the State Court. Section 5-808 provides as follows:

> "Pleading statute of limitations.—In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provision of section ——— (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish on the trial the facts showing that the cause of action is so barred."

WHEREFORE, We respectfully submit that a rehearing should not be granted and that this Court need not amplify its opinion except perhaps to direct that Appellee's suit to quiet title should be dismissed, because that action was founded upon the erroneous contention that Appellant was not, under the Idaho Statutes, entitled to a lien on Appellee's Carey Act lands.

Respectfully submitted,

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